75-1908

Supreme Court, U. S.
FILED
JUL 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Petitioners,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GEORGE DUGGAN,
Counsel for Petitioners,
10 Commerce Court,
Newark, New Jersey 07102.

PARSONNET, PARSONNET & DUGGAN,
Attorneys for Petitioners.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

110

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	3
QUESTION PRESENTED	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
APPENDIX:	
Per Curiam Opinion of the United States Court of Appeals for the Third Circuit	1a
Judgment of the United States Court of Appeals for the Third Circuit	9a
Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Circuit	11a
Opinion of the United States Court of Appeals for the Third Circuit	13a
Judgment of the United States Court of Appeals for the Third Circuit	27a
Letter Opinion of the United States District Court of New Jersey (On Remand)	30a
Judgment of the United States District Court for the District of New Jersey	39a
Notice of Motion for New Trial	47a
Affidavit of Benjamin Percario in Support of Notice of Motion	49a

PAGE

Opinion of the United States District Court for the District of New Jersey 55a

Opinion and Order of the United States District Court for the District of New Jersey on Defendant's Motion for Rehearing and Reconsideration 78a

Supplemental Opinion of the United States District Court for the District of New Jersey 81a

Order for Judgment of the United States District Court for the District of New Jersey 89a

Opinion of the United States Court of Appeals for the Third Circuit 92a

Letter dated February 9, 1966 from Director of Compliance to Mr. Leo Rosen (Exhibit 3) 113a

Decision of Commissioner Jackson (Exhibit 4) 115a

Opinion of the United States Court of Appeals for the 4th Circuit Re: Chastang v. Flynn and Emrick Co., et al., dated June 10, 1976 ..... 119a

Cases Cited

Albemarle Paper Company v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L. Ed.2d 280 (1975)..... 7, 9

Chastang v. Flynn and Emerick Co., 337 F. Supp. 807 (D.Ct. Md. 1972); 365 F. Supp. 957 (D. Ct. Md. 1973); Aff. in part, rev. in part, —— F.2d —— (4th Cir., June 10, 1976)..... 7

Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D.C. Conn. 1974), Aff. in part, rev. in part, 519 F.2d 559 C.C.A. 2d; 1975) *Cert.* granted Bitzer v. Matthews, Dkt. 75-251 9

Stopford v. Boonton Molding Co., 56 N.J. 169, 265 A.2d 657 (1970)..... 9

Statutes Cited

PAGE

28 U.S.C.:

Sec. 1343 3

42 U.S.C.A. (Civil Rights Act of 1974, Title VII):

Sec. 2000e-2(a)(1) 1, 3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION
and MORGAN SWEENEY,

Petitioners,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Leo Rosen, Utility Co-Workers Association and Morgan Sweeney, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered January 30, 1976, affirming the judgment of the District Court on the method of assessing damages against Respondent for violation of Title VII of the Civil Rights Act of 1974, 42 U.S.C.A. 2000e-2(a)(1), and that on hearing the judgment be reversed, and remanded for modification.

Opinions Below

1. The per curiam opinion of the Court of Appeals for the Third Circuit, dated January 30, 1976, affirming the judgment of the District Court, dated February 28, 1975 assessing damages has not been published 527 F.2d 645 (1a).

2. The Letter Opinion of the District Court dated December 13, 1975 is not reported (31a).

3. The Opinion of the Court of Appeals for the Third Circuit, filed March 8, 1973, affirming the judgment of the District Court, filed June 16, 1971, except as to that portion which denied petitioners' application for damages, and remanding the causes for a determination of damages, is reported, 477 F.2d 90 (13a).

4. The Opinion of the District Court filed August 25, 1970 is not reported (55a).

5. The Opinion and Order of the District Court dated November 24, 1970 is not reported (78a).

6. The Supplemental Opinion of the District Court entered denying petitioners' application for damages is reported, 328 F.Supp. 454 (81a).

7. The Opinion of the Circuit Court of Appeals filed April 1, 1968, reversing the summary judgment entered in favor of defendant in the District Court is reported, 409 F.2d 775 (92a).

8. The Letter Opinion Decision of the Equal Employment Opportunity Commission, dated January 26, 1966, finding reasonable cause to believe that an unfair employment practice had been committed within the meaning of the Civil Rights Act of 1964 is not reported (112a).

9. Decision of Commissioner Jackson, Equal Employment Opportunity Commission, dated January 26, 1966 (115a).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 30, 1976. Timely motion for rehearing was filed and was decided on April 2, 1976. The Court has jurisdiction by virtue of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-2(a)(1), and 28 U.S.C. Sec. 1343.

Question Presented

1. Whether the payment of higher pensions to females than males, who have selected early retirement since July 2, 1965, violates the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-2(a)(1)?

Statutory Provisions Involved

42 U.S.C. §2000e-2. UNLAWFUL EMPLOYMENT PRACTICES—EMPLOYER PRACTICES

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin (July 2, 1964, P.L. 88-352, Title VII, 78 Stat. 255).

28 U.S.C. § 1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

Statement of the Case

Respondent's unfunded (50a) 1965 pension plan contained the following clause (17a):

> "Each male employee may . . . retire . . . at age sixty-five . . . Each female employee may . . . retire at age sixty . . .

> ". . . Each employee who retires under . . . normal retirement for age shall be paid, for life in monthly installments, a pension computed at the annual rate of 1% of the average annual wage or salary . . . multiplied by the number of years . . . of . . . service."

The pension plan also provided (18a):

> "Each male employee who retires under . . . early retirement . . . shall be paid . . . a pension . . . reduced by one-half of 1% for each month that such employee is less than age sixty-five at the time of retirement."

If an employee retired with 30 years service, earning $10,000 per year, on his or her 60th birthday, the female was paid a pension of $3,000; and, the male's pension was "reduced" by 30%, or $900, to $2,100.

On May 1, 1967, the pension plan was amended so that the pension of both the male and female early retiree was "reduced by one-quarter of 1% for each month that such employee is less than age sixty-five . . . and by an additional one quarter of 1% for each month that such employee is less than age sixty-two at the time of retirement." The amendment also provided (19a):

> ". . . in the case of a female employee who retires . . . no reduction in the amount of the pension shall be made on account of service prior to May 1, 1967."

Assuming the same employee, earning $10,000 per year, does not reach age 60, until May 1, 1977, and then retires with 40 years of service, the female will receive an annual persion of $3,790, compared to a male pension of $3,180, calculated as follows:

1. Up to May 1, 1967:

$10,000 annual salary x 1% x 30 years	=	$3,000

2. From May 1, 1967 to May 1, 1977:

$10,000 annual salary x 1% x 10 years	= $1,000	
Less 21% penalty	= $ 210	
Balance		$ 790
Total female pension as of May 1, 1977:		$3,790

A male retiring at the same time under the same circumstances will receive:

$10,000 x .01 x 40 years	= $4,000	
Less 21%	$ 820	
Total male pension as on May 1, 1977		$3,180
Difference between male and female pension as of May 1, 1977		$ 610

The District Court awarded damages in accordance with the following formula, approved by the Court of Appeals (25a, 26a, and 34a):

> ". . . the retirement credit of males . . . must be increased for the relevant period between July 2, 1965, and May 1, 1967 . . ."

Application of the above formula resulted in a District Court award of 8¢ per month to employee Lawler (43a). He retired early on August 13, 1965, at a pension of $249.16 per month, which is $24.64 per month lower than the monthly pension of ~~$237~~ 273.80 which would

be paid to a female (51a). Thus, in 11 years, from his retirement in August 1965, to July 1976, he received $3,252.48 less than a female. The total amount awarded by the District Court for this period of 132 months at 8¢ per month (43a) is $10.56. Similar 11 year projections for all employees on the list annexed to the District Court judgment (43a to 46a) would show male employees on the list receiving approximately $235,000 less than females, as compared to the District Court award of approximately $10,450, for the same period.

REASONS FOR GRANTING THE WRIT

1. Under the formula used by the District Court to assess damages, males who retired early since July 2, 1965, continue to be penalized and receive lower pensions than females who retired under the same circumstances. Females hired prior to July 2, 1965, who select early retirement in the year 2005, will still receive higher pensions than males. The 1965 pension plan and the 1967 amendment will perpetuate the discriminatory penalty against males for over 40 years, beyond July 2, 1965. This is contrary to the Civil Rights Act of 1964, section 2000e-2(a)(1) which makes it unlawful, from July 2, 1965:

> "to discriminate against any individual with respect to . . . employment, because of such individual's . . . sex."

2. The judgment entered herein conflicts with *Chastang* v. *Flynn and Emerick Co.*, 337 F. Supp. 807 (D.Ct. Md. 1972); 365 F. Supp. 957 (D.Ct. Md. 1973); Aff. in part, rev. in part, —— F.2d —— (4th Cir., June 10, 1976) in which the Court stated (127a):

"The Company and the individual defendants . . . argue that damages should be limited to those benefits which were earned subsequent to July 2, 1965 — the effective date of the Civil Rights Act of 1964.

"We recognize that Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3 Cir. 1973) on remand, 11 F.E.P. Cases 330 (D.N.J. 1974), affd without opinion, 527 F.2d 645 (1976) tends to support the position of the company and the individual defendants; nonetheless we agree with the district court."

And (127a and 128a):

"The reduction of their [the male employees] interest [in the pension fund] occurred by invoking the forfeiture provisions which became effective upon their early retirement. It is true that authorization for forfeiture existed from December 31, 1942 —the date on which the plan was established— but the possibility of forfeiture was inchoate and not effective until they elected early retirement . . . Plaintiffs' early retirement did not take place until after the effective date of the Act. Thus, we see no retroactive application of the Act."

And (128a):

". . . The invalidation of the discrimination involved no retroactive application of the Act and . . . the Court was correct in awarding damages equal to the total value of the divestiture. Albemarle Paper Co. v. Moody, 42 U.S. 405 (1975)."

Also, see *Stopford* v. *Boonton Molding Co.*, 56 N.J. 169, 183, 184, 265 A.2d 657 (1970) wherein the New Jersey Supreme Court stated:

"The . . . pension plan . . . is an offer to pay a pension upon . . . continuance in . . . employ until the required age and period of service were reached . . . Satisfaction of those requirements . . . brought about a vesting of the right to the lifetime benefits as prescribed by the plan."

3. The judgment entered herein conflicts with the result in *Fitzpatrick* v. *Bitzer,* 390 F. Supp. 278 (D.C. Conn. 1974), Aff. in part, rev. in part, 519 F.2d 559 (C.C.A. 2d; 1975) *Cert.* granted under *Bitzer* v. *Matthews,* Dkt. 75-251, in which the Court granted injunctive relief requiring the defendant to bring the current amount of males' pensions up to the females' upon early retirement.

4. It is also contrary to *Albemarle Paper Company* v. *Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L. Ed.2d (1975), in which this Court states:

"It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination."

Respectfully submitted,

PARSONNET, PARSONNET & DUGGAN
Attorneys for Petitioners
10 Commerce Court
Newark, New Jersey 07102
(201) 622-8347

By: GEORGE DUGGAN
Counsel for Petitioners

APPENDIX

Per Curiam Opinion of the United States Court of Appeals for the Third Circuit

(Filed—January 30, 1976)

Nos. 75-1728 and 75-1729

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Appellants in No. 75-1728

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

MORGAN SWEENEY and UTILITY CO-WORKERS ASSOCIATION,

Appellants in No. 75-1729

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

On Appeal from the United States District Court for the District of New Jersey

D. C. C. A. Nos. 245-66 and 955-68

Per Curiam Opinion of the United States Court of Appeals for the Third Circuit

Argued January 6, 1976

Before: VAN DUSEN, ADAMS and WEIS, *Circuit Judges.*

PARSONNET, PARSONNET & DUGGAN,
Newark, New Jersey 07102
Attorneys for Appellants

GEORGE DUGGAN,
Of Counsel

HERMAN H. WILLE, JR.,
Newark, New Jersey 07101
Attorney for Appellee
Public Service Electric
And Gas Company

PER CURIAM:

The principal issue in this appeal is whether the damages awarded by the district court to the plaintiffs, former male employees of a public utility, for violation of the employment discrimination provisions of the Civil Rights Act were calculated in accord with our previous decision in this case.[1]

Public Service Electric and Gas Company (Public Service), the defendant, has maintained a pension plan for its employees since 1911. Benefits were based upon an employee's average annual salary for the five years of highest

[1] Plaintiffs alternatively urge us to modify the instruction given in the Court's prior decision regarding the method of calculating damages. In view of the law-of-the-case doctrine, we decline to do so. *See* note 9 *infra* and accompanying text.

Per Curiam Opinion of the United States Court of Appeals for the Third Circuit

earnings in the last ten years of employment, and upon the total number of years of service with the company. Under the terms of the plan in effect in 1965, pension benefits of employees who retired before attaining "normal retirement age"—65, in the case of men, or 60, in the case of women—were reduced according to a stated formula. The critical factor in the formula determining the extent of the decrease in the benefit payments was the number of months remaining, at the time of retirement, until the employee reached "normal retirement age." For each additional month by which the employee's age upon his or her actual retirement fell short of the "normal retirement age," the loss of pension payments increased.

Because the "normal retirement age" for women was less than that for men, the result was that pension payments could differ for a man and a woman who retired at the same age, with the same average salary, and after the same number of years of employment. For example, if a man and a woman identically situated with regard to salary and tenure both retired at age 61, the man's pension would be reduced, since he was retiring four years before the "normal retirement age" for males. The woman would suffer no loss in her pension allowance, however, since she had already passed he "normal retirement age" for females. Consequently, the result would be a higher pension for the woman.

Title VII of the Civil Rights Act of 1964,[2] which prohibits discrimination in employment on the basis of several attributes, including gender, went into effect on July 2, 1965. Thereafter, in order to remedy the inequities they perceived in the pension situation, several male employees

[2] 42 U.S.C. 2000e to 2000e-17 (Supp. IV, 1974).

and their collective bargaining representative brought employment discrimination charges against Public Service.

Subsequent to the filing of the suit in the district court, Public Service amended its pension plan. The new plan, effective May 1, 1967, eliminated the disparity in the "normal retirement age" for men and women, making the age 65 for both, and retained an arrangement for reducing the pension allotments of any employee who retired before reaching age 65. A sort of grandmother clause in the amended plan provided that women who retired early would not be penalized in the calculation of their pensions for employment prior to the date the modified plan came into force. There was no such clause for men.

The plaintiffs amended their complaint to include an allegation that the new plan also violated Title VII, in that it discriminated against males who retired after Title VII became effective. The district court granted summary judgment in favor of Public Service on the grounds that the challenge to the first plan was moot, since it had been superseded by the amended plan, and that no charge had been filed with the Equal Employment Opportunity Commission regarding the second plan. This Court vacated that judgment and remanded for a determination whether Title VII was violated by either plan.[3] On re-

[3] 409 F.2d 775 (3d Cir. 1969). Because of the possibility that male employees who had retired under the terms of the superseded plan were being harmed by it, the question whether the superseded plan violated Title VII was not moot. *Id.* at 780-781. The first claim regarding the validity of the amended plan, instituted by Leo Rosen, the Utility Co-Workers Association, and Morgan Sweeney, was ordered consolidated with a separate lawsuit, brought by Morgan Sweeney and the Utility Co-Workers Association, challenging the same plan. *Id.* at 782. The two actions remain consolidated.

mand, the district court found that both versions of the pension plan transgressed Title VII because of their impact on male employees.[4] The district court therefore ordered Public Service to cease and desist from discriminating between men and women, but it refused to award damages.[5] We affirmed the finding of a violation of the statute, but held that an award of damages was required. The case was once again returned to the district court, this time for a determination of damages.[6] In the opinion remanding the case, this Court added the specific caveat that "the retirement credit of males . . . must be increased for the relevant period between July 2, 1965 [the effective date of Title VII] and May 1, 1967 [the effective date of the amended pension plan]."[7]

[4] The discriminatory impact of the amended plan is illustrated by the following example. A man and a woman both retire on May 1, 1968, at age 60, with a $10,000 average salary and 30 years of employment with the company. The full pension, before the reduction for early retirement is $3,000 per year for each. The man's full pension is reduced by 21%, the reduction factor that is applicable when an employee retires five years early, resulting in an annual benefit of $2,370. Because of the grandmother clause applicable to female employees, only one year's worth of the woman's $3,000 pension—namely the $100 of the benefits for that year of employment coming after May 1, 1967—is reduced by the 21% factor. Her pension is thus $2,979 per year. The result is that after the reductions, the woman's pension exceeds the man's.

[5] 328 F. Supp. 454 (D.N.J. 1971).

[6] 477 F.2d 90 (3d Cir. 1973).

[7] *Id.* at 96.

Following that instruction, the district court held that an adjustment was required in the pension benefits due the male employees for *work performed* during the twenty-two month period between July 2, 1965 and May 1, 1967. Damages were assessed on the basis of that equalization proviso. The district court stated that the clear language of the Court of Appeals foreclosed it from considering the plaintiffs' contention that the necessary adjustment was one that would require equalized pension benefits for *all years* of service with the company to be given to every male employee who *retired* during the relevant twenty-two-month period.[8] The district court thus fashioned a grandfather clause for male employees corresponding to the grandmother clause that the amended pension plan made applicable to women. However, the judge ruled that the reach of the grandfather clause had to be limited to the twenty-two-month period between July 2, 1965 and May 1, 1967. No such limitation applied to the grandmother clause, which was based upon the pension rights vested in the women employees. The plaintiffs in essence urged the

[8] Nos. 245-66, 955-68 (D.N.J., Dec. 16, 1974). The parties agreed that the plaintiffs' right to compensation for the defendant's violation of Title VII was limited to events occurring after the effective date of the Civil Rights Act. They differed, however, on the description of the relevant "event." Plaintiffs maintain that no right to pension benefits accrues until the day of an employee's retirement, and that the computation of benefits for any employee who retired after July 2, 1965 must be based upon the employee's full term of service with the company. Public Service, on the other hand, contends that the right to pension benefits accrues day by day, a small amount at a time. Under the company's theory, equalization in pension payments would be required only for payments vesting as a result of work performed after July 2, 1965.

district court to create a grandfather clause that similarly had no time limitation.

The ruling by a panel of this Court that the plaintiffs' pension payments had to be increased for work performed during the interval between the effective date of Title VII and that of the modified pension plan became the law of the case.[9] It bound the district court on remand, and controls the decision in this appeal. A review of the record that was before the panel that decided the previous appeal and an analysis of the language used in its opinion demonstrated that the district court faithfully executed the panel's instructions regarding the calculation of damages.

Plaintiffs have been awarded attorneys' fees, as authorized by Title VII, for legal services in the district court.[10] They now request fees for work performed before this Court in the present appeal and the previous one.[11] Congress has mandated that only the "prevailing party" may be awarded an attorneys' fees. The plaintiffs may therefore recover a fee only for services performed in connection with an appeal in which they prevailed. Plaintiffs' counsel has represented that he spent 46 hours working

[9] Antonioli v. Lehigh Coal & Nav. Co., 451 F.2d 1171, 1178 (3d Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); A. S. Kreider Co. v. United States, 117 F.2d 133, 135 (3d Cir. 1940), *rev'd on other grounds*, 313 U.S. 443 (1941); 1B J. Moore, Federal Practice ¶ 0.404[1], at 402-03 (2d ed. 1974).

[10] 42 U.S.C. § 2000e-5(k) (1970).

[11] Attorneys' fees may be awarded by the court of appeals as well as by the trial court. Van Hoomissen v. Xerox Corp., 503 F.2d 1131, 1132-33 (9th Cir. 1974).

Per Curiam Opinion of the United States Court of Appeals for the Third Circuit

on the last appeal, and the parties have stipulated that $60 per hour is the suitable rate of payment. An attorneys' fee of $2,760 is thus appropriate.[12]

The judgment of the district court will be affirmed, an attorneys' fee of $2,760 will be awarded the plaintiffs, and costs will be taxed against the defendant.

To THE CLERK:

Please file the foregoing opinion.

.....

Circuit Judge

[12] The rule of Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), that attorneys' fees ordinarily cannot be recovered by the prevailing party, is not applicable here because of the statutory authorization of the fee award in § 706(k) of the Civil Rights Act of 1964 42 U.S.C. § 2000e-5(k) (1970). The Supreme Court expressly noted in *Alyeska* that an exception to the general rule exists where congress has authorized the award, and that when it has done so, a fee may be granted consistent with Congressional standards. 421 U.S. at 257.

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-1728/75-1729

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Appellants in No. 75-1728

MORGAN SWEENEY and UTILITY CO-WORKERS ASSOCIATION

Appellants in No. 75-1729

VS.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

(D.C. Civil Action Nos. 955-68 and 245-66)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

VAN DUSEN, ADAMS and WEIS, *Circuit Judges*

Judgment of the United States Court of Appeals for the Third Circuit

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 3, 1975 be, and the same is hereby affirmed, an attorneys' fee of $2,760. will be awarded the plaintiffs, and costs will be taxed against the defendant.

ATTEST:

THOMAS P. QUINN
Clerk

January 30, 1976

Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-1728 and 75-1729

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Appellants in No. 75-1728

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

MORGAN SWEENEY and UTILITY CO-WORKERS ASSOCIATION

Appellants in No. 75-1729

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

SUR PETITION FOR REHEARING
BY PANEL

Present:

VAN DUSEN, ADAMS and WEIS, *Circuit Judges*

Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Circuit

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

ARLIN M. ADAMS
Circuit Judge

Dated: April 2, 1976

Opinion of the United States Court of Appeals for the Third Circuit

(Filed—March 8, 1973)

UNITED COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1893

LEO ROSEN, Utility Co-Workers Association and MORGAN SWEENEY,

Appellants,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY.

No. 71-1894

LEO ROSEN, Utility Co-Workers Association and MORGAN SWEENEY,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Appellant.

Opinion of the United States Court of Appeals for the Third Circuit

No. 71-1895

MORGAN SWEENEY and UTILITY CO-WORKERS ASSOCIATION,
Appellants,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY.

No. 71-1896

MORGAN SWEENEY and UTILITY CO-WORKERS ASSOCIATION,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY.
Appellant.

On Appeal from the United States District Court
for the District of New Jersey

ARGUED SEPTEMBER 26, 1972

Before STALEY, VAN DUSEN and ROSEN, *Circuit Judges.*

Opinion of the United States Court of Appeals for the Third Circuit

OPINION OF THE COURT

George Dugan, Attorney for Appellants in Nos. 71-1893 and 71-1895
10 Commerce Court
Newark, New Jersey 07102

Luke A. Kiernan, Jr., Attorney for Appellee in Nos. 71-1893 and 1895 and for appellants in Nos. 71-1894 and 71-1896
90 Park Place
Newark, New Jersey 07101

John de J. Pemberton, Jr.
Acting General Counsel

Julia P. Cooper
Chief, Appellate Section

Lutz Alexander Prager
Attorney

Equal Employment Opportunity Commission
1800 G Street N.W.
Washington, D.C. 20506
Attorneys for amicus curiae

By STALEY, *Circuit Judge.*

These are cross appeals from the judgment of the United States District Court for the District of New Jersey.[1]

[1] Rosen v. Public Service Electric and Gas Co., 328 F. Supp. 454 (D.N.J. 1971).

That court found two versions of the Public Service Electric and Gas Company ("company") pension plans, which discriminated between employees on the basis of sex, violative of Title VII, § 703(a)(1) of the Civil Rights Act of 1964 ("Act"), 42 U.S.C. §20003-2(a)(1).[2]

Charges in the captioned cases were originally filed separately with the Equal Employment Opportunity Commission ("EEOC").[3] After the administrative remedies provided under the 1964 Act were exhausted, suits were brought in the district court. The cases were consolidated there after this court vacated a summary judgment in favor of the defendant and remanded the first of these actions.[4]

---

[2] Section 2000e-2(a) provides in pertinent part:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *."

[3] The EEOC was permitted to file briefs as amicus curiae and to participate in oral argument.

[4] Rosen v. Public Service Electric and Gas Co., 409 F.2d 775 (C.A. 3 1969). The attack on the first pension plan was initiated by filing a charge of discrimination with the EEOC on November 15, 1965. On March 9, 1966, following unsuccessful conciliatory efforts by the commission, suit was entered in the first of the captioned cases.

Subsequently, the complaint was amended to include in its scope the discriminatory feature of the modified pension plan. On appeal, this court remanded the first case with the suggestion that it be consolidated with a second suit filed on September 20, 1968, which raised the same issues as the amendment.

The district court held both plans to be violative of the Act and ordered the company to cease and desist from discriminating between men and women as to retirement benefits.[5]. However, no award of compensatory damages were made. The plaintiffs have appealed from the denial of monetary relief; the company has cross appealed from the remainder of the judgment.

A pension plan was first instituted by the company in 1911.[6] According to its terms a female was permitted to

---

[5] The court found that employees had retired under both plans.

> "* * * The defendant's records disclose that during the period in question, being November 15, 1965, to the present, the following number of employees retired early: 6 females, 48 males." Rosen v. Public Service Electric and Gas Co., 328 F. Supp. 454, 467 (D.N.J. 1971).

[6] The 1911 plan in pertinent part provided as follows:

> "Section 3. Each male employee may at his option retire at age sixty-five or thereafter upon completion of twenty-five years of service and must retire at age seventy. Each female employee may at her option retire at age sixty or thereafter upon completion of twenty years of service, and must retire at age sixty-five.
>
> "Section 4. Each employee who retires under the provision of this Pension Plan relating to normal retirement for age shall be paid for life, in monthly installments, a pension computed at the annual rate of 1% of the average annual wage or salary of such employee for the five years of highest earnings within the last ten years of the employee's service, multiplied by the number of years, and any fraction of a year, of the employee's service.

(Footnote continued on following page)

retire on full pension at age sixty if she had completed twenty years of service. A male, in order to receive full benefits, was required to have attained the age of sixty-five and to have served at least twenty-five years. Early retirement was available to a man at sixty only if he had served thirty years and then only at a reduced pension. Women were discriminated against in that their mandatory retirement age was sixty-five whereas their male counterparts could continue working until age seventy. The first plan was revised as the result of collective bargaining between the defendant and representatives of its employees.[7]

(Footnote continued from preceding page)

"Section 5. Each male employee may at his option retire at age sixty or thereafter but before attainment of age sixty-five upon completion of thirty years of service.

"Section 6. Each male employee who retires under the provisions of this Pension Plan relating to early retirement shall be paid for life, in monthly installments, a pension computed at the annual rate of 1% of the average annual wage or salary of such employee for the five years of highest earnings within the last ten years of the employee's service, multiplied by the number of years, and any fraction of a year, of the employee's service, and reduced by one-half of 1% for each month that such employee is less than age sixty-five at the time of his retirement."

[7] The revised plan provides the following with regard to pension benefits:

"Section 3. Normal Retirement for Age.

"(1) Each employee may at his or her option retire at age sixty-five or thereafter, and must retire at age seventy.

(Footnote continued on following page)

The revised version which took effect on May 1, 1967, perpetuated the discriminatory features of the 1911 plan only to the extent that it favored women hired prior to its effective date. The controversial section provides:

> "• • • in the case of a female employee who retires under the provisions of this Section 4, no re-

---

(Footnote continued from preceding page)

"(2) Each employee who retires under the provisions of this Section 3 shall be paid for life, in monthly installments, a pension computed at the annual rate of 1% of the average annual compensation of such employee for the five years of highest earnings within the last ten years of the employee's service, multiplied by the number of years, and any fraction of a year, of the employee's service.

"Section 4. Early Retirement.

"(1) Each employee may at his or her option retire at age sixty or thereafter, but before attainment of age sixty-five upon completion of twenty years of service.

"(2) Each employee who retires under the provisions of this Section 4 shall be paid for life, in monthly installments, a pension computed at the annual rate of 1% of the average annual compensation of such employee for the five years of highest earnings within the last ten years of the employee's service, multiplied by the number of years, and any fraction of a year, of the employee's service, and reduced by one-quarter of 1% for each month that such employee is less than age sixty-five at the time of retirement, and by an additional one-quarter of 1% for each month that such employee is less than age sixty-two at the time of retirement, except that in the case of a female employee who retires under the provisions of this Section 4, no reduction in the amount of the pension shall be made on account of service prior to May 1, 1967."

duction in the amount of the pension shall be made on account of service prior to May 1, 1967."

Under this plan the mandatory retirement age for all is seventy.

STANDING

On appeal the standing of the plaintiffs to maintain this suit is questioned. Standing "concerns • • • the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970). The substantive issues must be considered to ascertain whether "there is a logical nexus between the status asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 U.S. 83, 102 (1968). Standing for purposes of the Civil Rights Act of 1964 was intended by Congress to be defined as broadly as is permitted by Article III of the Constitution. Hackett v. McGuire Brothers, Inc., 445 F.2d 442 (C.A.3 1971).

Rosen, the company contends, lost standing to contest the alleged discriminatory practices when he retired. We do not agree. He was an active employee when this action was commenced and does not lose standing merely by accepting his pension. Hackett, supra; see Jenkins v. United States Gas Corp., 400 F.2d 28 (C.A.5, 1968). As one who was subject to the discriminatory provisions of the pension plans under consideration he has standing. Sweeney, an active male employee, also has a sufficient

personal stake in the outcome of this case to assure that concrete adverseness will occur. See Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971).

The company urges that the union has standing to represent neither the active employees nor the pensioners. Since both these class are represented by other plaintiffs, we need not decide whose rights the union, as bargaining representative of the company's employees, has standing to assert.[8] See Title VII of the Civil Rights Act, 8 Duq. L. Rev. 1 (1969).

DISCRIMINATION

Section 703(a)(1) of the Civil Rights Act of 1964 states that it is an unlawful employment practice to discriminate on the basis of sex "against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); see Employment—Sex Discrimination, 12 A.L.R. Fed. 15 (1972). Whether retirement plans fall within the purview of the above language is the threshold question in this case. We answer it in the affirmative.

---

[8] Unions have the apparent right to assert their members' rights in suits under the Civil Rights Act of 1964. See Rosen v. Public Service Electric and Gas Co., 409 F.2d 775, 780, n. 19 (C.A. 3, 1969); Local 186 v. Minnesota Mining and Mfg. Co., 304 F.Supp. 1284 (N.D.Ind. 1969). Retirement benefits of those employees who are not currently employed and have already retired are not a mandatory subject of collective bargaining under the NLRA. Allied Chemical & Alkali Workers of America, Local No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). However, it does not naturally follow, as the company implies, that a union loses all interest in the fate of its members once they retire.

The EEOC which is charged with the responsibility of administering the Act has issued the following guideline.

> "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex." 37 Fed. Reg. 6837 (1972).

Such an administrative interpretation is entitled to great deference. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Udall v. Tallman, 380 U.S. 1 (1965). That the guideline was not promulgated until after this suit was initiated is of no moment. Rights which came into being when the Act was passed are not abrogated by administrative interpretation. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (C.A.7), cert denied, 404 U.S. 939 (1971).

A reading of the statute convinces us that the commission's interpretation furthers the legislative purpose of the Act and is consistent with the plain meaning of the language employed.

> "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (C.A.7), cert. denied, 404 U.S. 991 (1971).

Persuasive, also, is the fact that the language in the Labor-Management Relations Act, 29 U.S.C. § 159(a), similar to that employed in § 703(a)(1) of the Civil Rights Act

of 1964, has been held to include retirement benefits. Inland Steel Co. v. NLRB, 170 F.2d 247 (C.A.7 1948), cert. denied, 336 U.S. 960 (1949).

We hold, therefore, that § 703(a)(1) of the Act prohibits discrimination with respect to retirement benefits on the basis of sex. Other courts are in agreement with us on this point. Bartmess, supra; Fillinger v. East Ohio Gas Co., —— F. Supp. —— (E.D.O. 1971). Clearly the plans in question violate the Act. They differentiate between men and women solely on the basis of sex, and such discrimination is prohibited. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (C.A.9, 1971); Lansdale v. Air Line Pilots Association International, 430 F.2d 1341 (C.A. 5, 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (C.A.7 1969) but cf. Gruenwald v. Gardner, 390 F.2d 591 (C.A.2), cert. denied, 393 U.S. 982 (1968).

We find no merit in the company's argument that the revised plan is valid because it resulted from collective bargaining.

> "The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert." Robinson v. Lorillord Corp., 444 F.2d 791, 799 (C.A. 4), cert. dismissed, 404 U.S. 1006 (1971); see United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (C.A.8, 1972), cert. denied 41 L.W. 3377 (1973).

Nor, as the company contends, does the revised plan's provision for gradually phasing out the discrimination

bring it into compliance with the Act. See 37 Fed. Reg. 6837 (1972); United States v. H. K. Porter Co., 296 F. Supp. 40 (N.D.Ala. 1968).

The revised plan, according to the company, merely preserves pre-existing rights of females which cannot be diminished. This may be true. The apparent effect of § 15 of the pension plan and Article XVII of the collective bargaining agreement is to bar the company from reducing the benefits of females. However, the company is not precluded from raising men's benefits to the level of women in order to achieve equality. Such adjustments have been recognized as a proper means of achieving that end. Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (C.A.8 1972).

REMEDY

On appeal the plaintiffs argue that compensatory damages should have been awarded to males who retired early under either of the discriminatory plans. With this we agree.

Section 706(g) provides that the court "may enjoin • • • and order such affirmative action as may be appropriate." 42 U.S.C. § 2000e-5(g).[9] "This grant of authority should be broadly read and applied so as to effectively terminate the practice and make the victims whole." *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 721 (C.A. 7, 1969).

[9] A Senate Report referring to § 706(g) stated that "The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion most complete relief possible." Cong. Rec. 3462, March 6, 1972.

The relief is intended to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination. Robinson v. Lorillard Corp., 444 F.2d 791 (C.A.4), cert. dismissed, 404 U.S. 1006 (1971). We are under a duty to render relief which will eliminate the "discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965); see Smith v. Young Men's Christian Association, 462 F.2d 634 (C.A.5, 1972).

Male employees did retire early under both versions of the pension plan.[10] These men now receive reduced pensions whereas women who retired under identical circumstances receive full benefits. The effective date of Title VII of the Civil Rights Act of 1964 was July 2, 1965. Men who have retired since that date with annuities reduced below those which they would have received had they been women must be compensated for the losses they sustained and are sustaining due to the discriminatory reduction in the amount of pensions on account of service prior to May 1, 1967, the effective date of the revised retirement plan, and after the effective date of the Act. Further, since we are of the view that the pension rights of active women employees which accrue before May 1, 1967, cannot be diminished, we hold that the retirement credit of males similarly situated must be increased for the relevant period between July 2, 1965,

[10] "Between July 1, 1965 and May 1, 1967 there were early retirements on pension by some male employees, members of the plaintiff union, as well as during the period from May 1, 1967 to the date of the Stipulation." Rosen v. Public Service Electric and Gas Co., 328 F. Supp. 454 (D.N.J. 1971).

and May 1, 1967. This must be done to cure the effects of discrimination since the effective date of the Act.

Other courts have invoked equitable powers under the Act to bring one group of employees up to the economic level of another. Victims of sex discrimination have been awarded three years' wages which were lost due to early retirement. Fillinger v. East Ohio Gas Co., —— F. Supp. —— (N.D.O. 1971). Overtime benefits have been extended to male employees where state law required that women receive overtime pay. Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (C.A.8, 1972); see Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (C.A.9, 1972). Further, the relief to be granted in the instant case is consistent with this court's decisions under the Equal Pay Act which serves the same fundamental purpose as the Civil Rights Act of 1964. See Hodgson v. Wheaton Glass Co., 446 F.2d 527 (C.A.3, 1971). In *Hodgson* we affirmed the judgment which awarded damages to effectuate the equalization of wage rates.

For the foregoing reasons this cause will be remanded to the district court for a determination of the damages consistent with this opinion.[11]

To the Clerk:

File the foregoing opinion.

(ILLEGIBLE)
Circuit Judge

[11] Plaintiffs have not on appeal asserted all the potential claims of members of the class, such as the right of women employees who were involuntarily retired at age 65 to recover damages. In view of the policy underlying F.R.Civ.P. 23(a)(4) and 23(e), the district court on remand should consider directing notice to all class members in accordance with 23 (d)(2).

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1893

LEO ROSEN, Utility Co-Workers Association and MORGAN SWEENEY,

Appellants,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY.

No. 71-1894

LEO ROSEN, Utility Co-Workers Association and MORGAN SWEENEY,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Appellant.

(D. C. Civil Action No. 245-66)

Judgment of the United States Court of Appeals for the Third Circuit

---

No. 71-1895

MORGAN SWEENEY and Utility Co-Workers Association,

Appellants,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY.

No. 71-1896

MORGAN SWEENEY and Utility Co-Workers Association,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Appellant.

(D. C. Civil Action No. 955-68)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: STALEY, VAN DUSEN and ROSENN, *Circuit Judges*

Judgment of the United States Court of Appeals for the Third Circuit

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 16, 1971, be, and the same is hereby affirmed, except as to that portion of the said order which denied plaintiffs' application for damages. As to the question of damages, these causes are remanded to the said District Court for a determination of damages and for further proceedings consistent with the opinion of this Court. Costs taxed in favor of appellants in cases No. 71-1893 and 71-1895, and in favor of appellees in cases No. 71-1894 and 71-1896.

ATTEST

THOMAS P. QUINN
Clerk

March 8, 1973

Letter Opinion of the United States District Court of New Jersey (On Remand)

December 16, 1974

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
HERBERT J. STERN
JUDGE

UNITED STATES COURT HOUSE
NEWARK, N. J. 07101

December 13, 1974

George Duggan, Esquire
Parsonnet, Parsonnet & Duggan
10 Commerce Court
Newark, New Jersey 07102

Herman H. Wille, Jr., Esquire
80 Park Place
Newark, New Jersey 07102

Re: Leo Rosen, et als. v. Public Service Electric and Gas Company

Civil Action No. 245-66

Morgan Sweeney, et als. v. Public Service Electric and Gas Company

Civil Action No. 955-68

Letter Opinion of the United States District Court of New Jersey (On Remand)

LETTER OPINION

Gentlemen:

The above-captioned matters are before this Court on remand from the United States Court of Appeals for the Third Circuit, with directions to determine damages consistent with the opinion of that Court delivered March 8, 1973. *Rosen, et als.* v. *Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973).

In 1971, this Court found two versions of defendant Public Service's pension plans violative of Title VII of the Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1). At that time, the Court held that both versions of the plan impermissibly discriminated among employees on the basis of sex, and ordered defendant Public Service to cease and desist from discriminating between men and women with regard to retirement benefits. The Court refused to award compensatory damages. *Rosen* v. *Public Service Electric and Gas Co.*, 328 F.Supp. 454 (D. N.J. 1971). Plaintiffs appealed from the denial of monetary relief, and defendant appealed from the remainder of the judgment.

Under the original 1911 version of the pension plan, a female employee could choose to retire at age 60, with full pension rights, if she had completed 20 years of service with Public Service. Male employees, on the other hand, were required to reach age 65 and to have completed 25 years of service with the company in order to receive full pension rights upon retirement. The plan discriminated against women as well, in that they were required to retire at age 65 while men could continue working

Letter Opinion of the United States District Court of New Jersey (On Remand)

until age 70. Only the discrimination against male employees, however, is at issue now.*

---

* Footnote 11 of the opinion of the Court of Appeals, 477 F.2d at 96, reads as follows:

> Plaintiffs have not on appeal asserted all the potential claims of members of the class, such as the right of women employees who were involuntarily retired at age 65 to recover damages. In view of the policy underlying F.R.Civ.P. 23(a)(4) and 23(e), the district court on remand should consider directing notice to all class members in accordance with 23(d)(2).

The Court has carefully considered this issue. A review of the record of *Rosen* v. *Public Service*, Civil Action No. 245-66, reveals that the complaint contains no class action. allegations, and that the case was never certified as a class action by the District Court. The complaint in *Sweeney* v. *Public Service*, Civil Action No. 955-68, on the other hand, includes class allegations, which are denied in the answer. However, the District Court apparently never had occasion to pass on the validity of the class, as required by Rule 23(c)(1) of the Federal Rules of Civil Procedure.

The two actions were consolidated for purposes of trial, by consent, on October 7, 1969.

The problem of the representative character of this consolidated suit was discussed at the pretrial conference before this Court on September 4, 1974. The Court noted at that time:

> The defendant Public Service has also stipulated, as I understand it, that once the courts have with finality—that is, upon the exhaustion of all appeals—once the courts have determined the measure of damages to be applied the construction of Title VII which comes out of this case shall be applied by Public Service not only to the employees now represented in this lawsuit and before the Court but to all other male employees who are employed by Public Service, whether they appear formally before this Court or not.

(Footnote continued on following page)

Letter Opinion of the United States District Court of New Jersey (On Remand)

(Footnote continued from preceding page)

> Upon that representation the Court does not believe it necessary to consider on its own motion whether or not the class of men here represented is broad enough, since upon the representation of the defendant all of its employees will get the benefit of whatever is finally determined by this action.

(Tr. 4-5)

At the same conference, counsel for defendant confirmed the Court's observation regarding the stipulation:

> Mr. Wille: On behalf of the Public Service I wish to state that the representation of the Court regarding stipulations of the Public Service that the Pension—pardon me—that the formula would be applied to all male employees is correct.

(Tr. 7-7a)

It is the Court's view that, with regard to other male employees similarly situated, no prejudice can result from continuation of this consolidated suit without notice to them. Since the suit was never certified as a class action, there is no need to afford members of the class action, there is no need to afford members of the class the opportunity to opt out of the class; they will not be estopped from bringing individual actions by the resolution of these suits. In addition, the representation of the defendant secures for all male employees similarly situated the benefits of the relief won by plaintiffs here.

The Court of Appeals specifically referred to the possibility of directing notice to female employees who were involuntarily retired before male employees solely on the basis of sex. Several courts have held that such employees may have a right to an award of back pay for the period during which they were prevented from working by their employer's discriminatory policies. Cf. *Fillinger* v. *East Ohio Gas Co.*, 4 E.P.D. ¶7618 (N.D. Ohio 1971). It is the Court's view, however, that since the instant consolidated suits were never certified as class actions, and since the damage calculation theory announced today applies only to male employees who suffered discriminatory pension treatment upon early retirement, the potential rights of female retirees to back-pay awards cannot be prejudiced by failure to give them notice of the pendency of these actions.

The Court therefore concludes that directing further notice under Rule 23(d)(2) is unnecessary in the context of these lawsuits.

The Civil Rights Act took effect on July 2, 1965. The Public Service pension plan was amended, effective May 1, 1967, to cure the disparate treatment of male and female employees with regard to retirement and pension benefits, except that the amended plan perpetuated discriminatory benefits in favor of women hired before May 1, 1967. 477 F.2d at 93. Under the revised plan, the mandatory retirement ages for all employees is 70.

These two consolidated cases are before this Court solely on the issue of the appropriate remedy. The Court of Appeals held that plaintiffs are entitled to compensatory damages under the following formula:

> Male employees did retire early under both versions of the pension plan. These men now receive reduced pensions whereas women who retired under identical circumstances receive full benefits. The effective date of Title VII of the Civil Rights Act of 1964 was July 2, 1965. Men who have retired since that date with annuities reduced below those which they would have received had they been women must be compensated for the losses they sustained and are sustaining due to the discriminatory reduction in the amount of pensions on account of service prior to May 1, 1967, the effective date of the revised retirement plan, and after the effective date of the Act. Further, since we are of the view that the pension rights of active women employees which accrue before May 1, 1967 cannot be diminished, we hold that the retirement credit of males similarly situated must be increased for the relevant period between July 2, 1965, and May 1, 1967. This must be done to cure the effects

> of discrimination since the effective date of the Act.

477 F.2d at 96.

Defendant asserts that this language requires this Court to limit the damage award to the differential benefits received by male and female employees for services performed between July 2, 1965 and May 1, 1967. In other words, men who have retired since July 2, 1965 would receive increased benefits henceforth only with regard to pension rights they accrued for work performed during that 22-month period, and would receive no increase in benefits for work performed before the effective date of the Act.

Plaintiffs maintain that the proper measure of damages would extend to pension benefits relating to *all* the company service of all men who retired after the effective date of the Act. Plaintiffs rely on an alternative view of the vesting of pension rights from that asserted by defendant and apparently endorsed by the Court of Appeals. Instead of treating pension rights as accruing currently as earned, plaintiffs argue that such rights vest only upon retirement. Plaintiffs point to *Stopford* v. *Boonton Molding Co.*, 56 N.J. 169, 265 A.2d 657 (1970), in which the Supreme Court of New Jersey likened a pension plan to a unilateral contract. Such an analysis would view the employer's establishment of the plan as a promise in exchange for future performance by the employee, whereby the employer agrees to provide pension benefits upon the employee's retirement, provided that the employee satisfy all the conditions of the plan, such as continuing to work and to make the prescribed employee

contributions for the specified number of years, and remaining on the job until the retirement age established under the plan. The Supreme Court wrote:

> The contributory pension plan involved here is not a mere gratuity, the benefits of which depend upon the bounty of the employer. It is an offer to pay a pension upon compliance by the employee with terms and conditions set forth therein. . . . Satisfaction of those requirements constituted adequate consideration and brought about a vesting of the right to the lifetime benefits as prescribed by the plan.

56 N.J. at 183-184; 265 A.2d at 664.

Under the approach of the Supreme Court of New Jersey, an employee's rights to pension benefits after retirement, based on all his years of service, would not vest until retirement. The date of retirement would be viewed as the moment the employee completes the performance which constitutes the consideration for the employer's promise to provide lifetime pension benefits. As applied to the instant case, this theory would entitle all employees who retired on or after July 2, 1965 to equal pension benefits regardless of sex, based on their entire period of service with the company, including service performed before July 2, 1965.

Under either approach, male employees who retired before the effective date of the Act would be entitled to no relief, even though they may currently be receiving lesser benefits than women similarly situated, because the Civil Rights Act is not retroactive. *Griggs* v. *Duke Power Co.*, 420 F.2d 1225, 1230 (4th Cir. 1970), rev'd

on other grounds 401 U.S. 424 (1971). It may be that the present, post-Act discriminatory payments made to male employees who retired before the Act became effective constitute the sort of "present effects of past discrimination" which have been held actionable in other Title VII contexts. Cf. *United States* v. *Chesapeake and Ohio Ry. Co.*, 471 F.2d 582, 587 (4th Cir. 1972), *cert. denied* 411 U.S. 939 (1973); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 795 (4th Cir. 1971), *cert. denied* 404 U.S. 1006 (1971); *Griggs* v. *Duke Power Co., supra.* However, this Court is foreclosed from consideration of that possibility by the clear language of the Court of Appeals in limiting damages to "men who have retired since [July 2, 1965]." 477 F.2d at 96. Therefore, the group to be covered by the damages decree in this case is the group of all male employees who retired early on or after July 2, 1965. It was the apparent view of the Court of Appeals that it was not the purpose of the Act to reach back 20 or 30 years, and thus to disturb contractual relationships under which substantial rights and obligations had accrued. At least one other District Court has so construed the holding of the Court of Appeals in *Rosen. Chastang* v. *Flynn and Emrich Co.*, 365 F.Supp. 957, 968-969 (D. Md. 1973). It is the conclusion of this Court that it is bound by the language of the Court of Appeals, and must therefore embrace defendant's theory of the damage calculation period.

The parties shall agree on an order, consent as to form, and jointly present the order to the Court on the last motion day in January 1975. They shall be prepared to state at that time whether, in conformity with this opinion, they can agree on the appropriate dollar amount of dam-

Letter Opinion of the United States District Court of New Jersey (On Remand)

ages. If the dollar amount of damages remains in dispute when the parties appear, they shall be prepared to state whether, in light of the extensive mathematical computations necessary, it would be appropriate for the Court to appoint a special master under Rule 53 of the Federal Rules of Civil Procedure.

HERBERT J. STERN
United States District Judge

DATED: December 13, 1974

Judgment of the United States District Court for the District of New Jersey

---

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Defendant.

Civil Action No. 245-66

MORGAN SWEENEY and UTILITY CO-WORKERS ASSOCIATION,

Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Defendant.

Civil Action No. 955-68

JUDGMENT

The within matter, having been submitted to this Court on remand from the United States Court of Appeals for

the Third Circuit for a determination of the formulation and assessment of damages to be awarded plaintiffs for violation by defendant of Title VII of the Civil Rights Act of 1964 and its Pension Plan;

And the Court having considered the briefs of all parties, argument of counsel and the law applicable thereto:

It is on this 28 day of February, 1975, Ordered that the defendant, Public Service Electric and Gas Company, be hereby required to compensate, in the form of increased pension benefits, all those of its male employees who were members of the Utility Co-Workers Association, a party to this action and who have selected or may select early retirement on or after July 2, 1965, the effective date of the Civil Rights Act, with respect to pension rights accrued on account of service during the period from July 2, 1965 until May 1, 1967, the effective date of defendant's revised Pension Plan, all such increased pension benefits as have accrued to the date of this Order, to be paid in a lump sum and the increment in pension benefits to be paid henceforth, in accordance with the formula attached hereto, and in accordance with the attached lists showing monthly and total damage amounts for Utility Co-Workers Association's living and deceased retired employees and their beneficiaries.

It is further ordered that interest at the annual rate of six percent, compounded monthly, shall be added to the damage amounts payable on account of past deficiencies.

It is further ordered that the costs for the plaintiffs be taxed by the Clerk in accordance with Rule 54(d).

It is further ordered that in accordance with stipulation made by counsel for the defendant, Public Service Electric and Gas Company, at the pretrial conference held in this matter, this Order shall encompass all male employees represented in this action, as well as all those other male employees of defendant who are or will be similarly situated.

H. J. Stern

On motion of:

Herman H. Wille, Jr.
Attorney for Defendant.

We hereby consent to the
form of the above Order.

Parsonnet, Parsonnet & Duggan
Attorneys for Plaintiffs
By: George Duggan

Formula for Calculation of Damages Payable to Male Employees Retiring Early on or After July 2, 1965
(Without Interest)

Step 1—Determine normal monthly pension from date of hire to date of retirement (derived from Pension Plan).

Step 2—Determine monthly amount of early retirement penalty for service between May 1, 1967 and date of retirement (when applicable), and subtract from normal monthly pension to obtain balance.

Step 3—Determine monthly amount of early retirement penalty for service between date of hire and

July 2, 1965, and subtract from balance in Step 2.

STEP 4—Subtract the amount of the monthly pension calculated under early retirement provisions in effect at time of retirement (excluding the effect, if any, of survivorship options and supplemental payments) from the balance in Step 3 to determine the monthly damage amount.

STEP 5—If the employee had elected a pre-retirement survivorship option, multiply the monthly damage amount by the applicable reduction percentage (6 decimal places) (derived from Plan), and subtract the product from the monthly damage amount.

If the employee had elected a post-retirement survivorship option, multiply the remaining monthly damage amount by the applicable factor (4 decimal places) (derived from Plan).

STEP 6—Multiply the monthly damage amount (as modified by Step 5, if applicable) by the number of months since retirement in order to obtain the lump-sum damage amount.

STEP 7—If the retired employee received supplemental pension, multiply the net monthly damage amount by the percentage of increase (supplement), and multiply the product (monthly supplemental damages) by the nuumber of months on pension during the period May 1, 1971 (date supplemental payments started) through date of payment, in order to determine additional supplemental damages.

DAMAGES TO U.C.A. MALE EMPLOYEES
RETIRING EARLY WITH SERVICE
BETWEEN 7/2/65 AND 5/1/67
WITHOUT INTEREST

Name	*Employee Number*	*Case Number*	*Date Pensioned*	*Accumulated Damages thru 12/31/74*	*Monthly Amt. to be added to payments after 12/31/74*
Robert E. Casotto	24379	5917	8- 2-65	1.13	.01
George R. Lawler	30034	5929	8-13-65	8.32	.08
William R. Ashworth	49104	5978	11-17-65	25.40	.25
James E. Martino	42276	6031	12- 4-65	9.15	.09
Harry Hoogstra	32323	6052	1-20-66	9.03	.09
Forrest E. Weston	45729	6142	2- 8-66	30.59	.31
John J. Swift	50033	6191	3-17-66	22.42	.23
Joseph F. Kearney	32411	6223	6- 1-66	50.82	.53
David A. Carson	48116	6236	7- 8-66	18.19	.19
Wilfred T. Smith	40705	6372	9-20-66	66.15	.71
Reinhold Kretchman	40298	6387	10-14-66	7.34	.08
Wallace E. Taylor	49764	6446	1- 3-67	80.69	.89
Lloyd V. Naylor	35236	6445	1- 4-67	32.44	.36
John J. Hegener	33802	6415	1- 6-67	29.10	.32
William J. Buskey	43685	6480	1-21-67	17.08	.19
William J. Schannel	50179	6598	6- 3-67	88.04	1.02
Frederick Paton, Jr.	42577	6568	6-29-67	49.49	.58
Charles R. Christensen	31450	6647	7- 8-67	73.95	.87
Charles Bianchi	49751	6602	7-20-67	47.32	.56
Alfred L. Schroeder	45524	6677	7-27-67	93.98	1.11
Julius M. Noble	44201	6642	8- 3-67	227.05	2.69
Cornelius T. Clancy	33084	6730	10- 5-67	51.26	.62
Frank R. Otersen	28207	6722	11- 2-67	6.46	.08
Edward Gurriell	35775	6723	11-15-67	7.28	.09
Leslie Winsor	48266	6801	12-19-67	13.54	.17
Emil J. Battaline	34256	6794	1-20-68	20.89	.26
Alfred L. Abel	39530	6890	2-17-68	2.47	.03
George Della Donna	47238	6901	3- 9-68	50.43	.64

Judgment of the United States District Court for the District of New Jersey

Name	*Employee Number*	*Case Number*	*Date Pensioned*	*Accumulated Damages thru 12/31/74*	*Monthly Amt. to be added to payments after 12/31/74*
George A. Stevens	44441	6921	4- 6-68	29.60	.38
Theodore R. Tomlinson	21291	6956	4-30-68	100.09	1.30
Leo Plesinger	50048	6937	6-29-68	36.86	.49
James D. Wager	46631	7057	9- 4-68	16.82	.23
Edward W. Lockard	39019	7048	9- 7-68	37.36	.51
Edward R. Breece	27339	7107	12- 5-68	73.15	1.04
William I. Battin, Jr.	48353	7152	1-14-69	133.87	1.92
Walter Thomas	28156	7281	5- 1-69	47.43	.72
Welcome T. Williams	56770	7272	5-21-69	48.10	.73
Raymond E. McNeely	41132	7371	8-12-69	86.64	1.37
Walter R. Winter	42516	7372	8-12-69	16.38	.26
John F. Blewett	43509	7424	10-15-69	44.11	.72
Frank Renn	49749	7477	11-21-69	46.42	.77
William J. Barnes	47051	7510	1- 7-70	67.56	1.14
William R. VanDuyne	43649	7642	7- 6-70	12.83	.24
William C. Carter	54435	7659	8-10-70	89.56	1.71
Ralph J. Williams	33080	7724	8-25-70	65.92	1.27
William A. Beckmann	56283	7851	2- 5-71	42.06	.90
Franklin B. Lawson	49971	7891	4- 2-71	23.36	.52
Joseph L. Dorso	54953	7928	6- 1-71	57.19	1.33
Hugo V. Cassella	47078	7914	6- 8-71	38.93	.91
W. Howard Lauer	58072	7947	6-21-71	46.18	1.09
John A. Dawson	59978	7962	7- 9-71	51.75	1.24
John C. Pearthree	43632	8045	9-23-71	56.59	1.44
George F. Wimmer, Jr.	41143	8094	11-29-71	17.06	.46
Elmer W. Herget	54689	8112	11-29-71	41.91	1.13
Alfred Bissinger	44033	8096	12-10-71	38.88	1.06
William J. Schnable	49684	8093	12-10-71	14.67	.40
Albert Church	37598	8194	12-30-71	56.30	1.56
David J. Burton	47052	8127	1- 1-72	2.16	.06
Andrew L. Dudak	49698	8195	1-24-72	48.71	1.38
William R. Canning	48647	8244	3- 8-72	17.91	.53
Harry J. Mason	50619	8217	5- 8-72	64.82	2.04

Judgment of the United States District Court for the District of New Jersey

Name	*Employee Number*	*Case Number*	*Date Pensioned*	*Accumulated Damages thru 12/31/74*	*Monthly Amt. to be added to payments after 12/31/74*
Edward A. Keafer	44311	8351	7-10-72	5.35	.18
George Doorley	47151	8315	7-10-72	5.06	.17
Wilbur Rush	49860	8356	7-10-72	36.87	1.24
Leroy Brundage	50031	8397	9- 7-72	7.23	.26
George M. Metz	39079	8476	1- 2-73	31.90	1.33
John B. Grey	45645	8511	1- 5-73	29.54	1.24
John W. Johnson	65031	8510	1- 5-73	16.20	.68
Alexander Weir	55082	8545	1-25-73	28.14	1.21
George A. Bush II	49699	8603	2-21-73	11.81	.53
William R. Hennessey	53261	8599	3- 2-73	32.97	1.50
Paul Felekey	47000	8593	3- 7-73	2.41	.11
Joseph K. Wright	44651	8624	5- 8-73	4.75	.24
Howard F. Kilpatrick	50056	8665	6- 1-73	24.13	1.27
Peter P. Sexton	59958	8742	7-10-73	10.08	.57
John S. Huston	49495	8689	7-11-73	17.14	.97
Maurice Sissman	45918	8863	10- 3-73	24.76	1.66
Nicholas J. Tintle	59383	8888	12- 7-73	18.53	1.45
Arthur C. Watts	38491	8957	12-21-73	4.81	.39
Dennis J. Holland	47507	6644	9- 7-67	76.86	.92
Theodore Gross	42799	6773	12-28-67	124.33	1.55
Harry T. Comiskey	28369	7524	3- 6-70	15.47	.27
Lawrence M. Salvato	47036	8398	10-16-72	34.72	1.31
Harvey C. VanDerbeek	46297	8596	3-16-73	3.23	.15
Eugene J. Phillips	47655	8921	1-10-74	29.68	2.54
Albert A. Hansell	45929	9022	5-20-74	1.27	.17
Bruce Morecraft	47995	8967	1- 8-74	17.43	1.48
Joseph V. Lenox	49894	8899	2- 6-74	3.34	.32
Stewart A. Zabriskie	55813	8973	2-11-74	18.95	1.74
Harry T. Gross	51429	9069	4-24-74	27.82	3.38
Ellis F. Ziesse	55089	9197	8- 2-74	.35	.07
Stephen Koske	55819	9258	9-13-74	2.11	.59
John Farley	41752	9203	9-24-74	.88	.27
Robert E. Lohmann, Jr.	49780	9150	11- 6-74	8.16	4.07
James R. McShea	46360	9280	12- 6-74	1.01	1.30
Andrew O. Anderson	49985	9367	12-31-74	.01	.14

Judgment of the United States District Court for the District of New Jersey

DAMAGES DUE DECREASED U.C.A. MALE EMPLOYEEES THAT RETIRED EARLY WITH SERVICE BETWEEN 7/2/65 AND 5/1/67

Name	*Employee Number*	*Case Number*	*Date Pensioned*	*Date of Death*	*Damages thru Date of Death*
Stanley H. Apgar	40680	6224	5/2/66	1/21/73	79.16
Charles Farr	49066	6294	8/6/66	9/14/69	11.54
J. William Marsden	43288	6654	7/27/67	3/29/69	6.64
Charles M. Piano	43450	6799	12/4/67	11/13/73	79.31
Daniel R. Hogan	45240	6904	3/9/68	11/9/71	82.15*
Paul Dzina	48578	7175	1/4/69	10/15/72	28.83
Edmund F. Allen	53674	7214	1/11/69	4/26/72	37.70
George M. Satterthwaite	45647	7423	10/6/69	11/15/71	7.23

* Damages due the designated beneficiary under post-retirement survivorship option 2 of deceased U.C.A. male employee that retired early with service between 7/2/65 and 5/1/67.

Name	*Employee Number*	*Case Number*	*Benefit Eff. Date*	*Monthly Amt. To Be Added To Benefit 12/31/74*	*Benefit Damages thru 12/31/74*
Margaret Hogan	99089	6904	11/10/71	1.01	38.06

Notice of Motion for New Trial

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,
Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Defendant.

Civil Action No. 245-66

MORGAN SWEENEY and UTILITY CO-WORKERS ASSOCIATION,
Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Defendant.

Civil Action No. 955-68

Notice of Motion for New Trial

NOTICE OF MOTION

To: HERMAN H. WILLE, JR., ESQ.
Attorney for Defendant,
Public Service Electric
and Gas Company
80 Park Place
Newark, New Jersey 07102

SIR:

PLEASE TAKE NOTICE that on Monday, April 14, 1975, at 10:00 A.M. or as soon thereafter as counsel may be heard, the Plaintiffs herein, will seek an Order of the Court for a new trial on the issue of damages only, on the following grounds:

1. The judgment entered herein has resulted in a miscarriage of justice in that the male employees who select early retirement, receive lesser pensions than females and females have been forced to retire early.

2. Aforesaid judgment has been entered as a result of an error of law and has resulted in males and females being discriminated against solely on the basis of sex.

3. The damages awarded herein to male employees who retire early are inadequate.

PLEASE TAKE FURTHER NOTICE that at the hearing of the within Motion, Plaintiffs shall move for an Order of the Court requiring the Defendant to pay reasonable counsel fees in accordance with the Civil Rights Act of 1964.

At the hearing of the within Motion, Plaintiffs shall rely upon the Affidavit annexed hereto.

Dated: March 17, 1975

PARSONNET, PARSONNET & DUGGAN
Attorneys for Plaintiffs
By: /s/ GEORGE DUGGAN

Affidavit of Benjamin Percario in Support of Notice of Motion

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,
Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Defendant.

Civil Action No. 245-66

MORGAN SWEENEY and UTILITY CO-WORKERS ASSOCIATION,
Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Defendant.

Civil Action No. 955-68

Affidavit of Benjamin Percario in Support of Notice of Motion

AFFIDAVIT

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

BENJAMIN PERCARIO, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the President of Utility Co-Workers Association, a labor union, and one of the Plaintiffs herein. Aforesaid labor union has offices located at 22 East Park Street, Newark, New Jersey.

2. Annexed hereto is a schedule of male employees who have selected early retirement since July 2, 1965, showing the difference between payments made to said male employees and what female employees would have received under the same circumstances.

3. Up to May 1, 1967, Defendant never had a funded pension plan, but payments were always made from Defendant's current operating capital.

4. Pensions paid to males who retired early, before and after July 2, 1965, had no effect on pension payments to employees who retired before and after July 2, 1965.

5. I am aware of no actuarial computations upon which the amounts of pensions paid were based, in any way, upon the predicted amounts of moneys which would have been available to any fund for investment and other purposes due to early retirement by male employees.

/s/ BENJAMIN PERCARIO

(Sworn to March 17, 1975.)

Affidavit of Benjamin Percario in Support of Notice of Motion

DAMAGES TO U.C.A. MALE EMPLOYEES ON EARLY RETIREMENT

Name	*Date Pensioned*	*Monthly Pension*	*Female Monthly Pension*	*Monthly Diff.**	*Monthly Damages Awarded 7/2/65 5/1/67**	*Monthly Diff. Remaining**
Robert E. Casotto	8-2-65	$278.23	$281.04	$ 2.81	$ .01	$ 2.80
George R. Lawler	8-13-65	249.16	273.80	24.64	.06	24.58
William R. Ashworth	11-17-65	200.46	219.68	19.22	.22	19.00
James E. Martino	12-4-65	242.48	251.27	8.79	.10	8.69
Harry Hoogstra	1-20-66	289.98	295.90	5.92	.08	5.84
Forrest E. Weston	2-8-66	195.46	211.88	16.42	.27	16.15
John J. Swift	3-17-66	276.53	291.85	15.32	.25	15.07
Joseph F. Kearney	6-1-66	252.01	273.92	21.91	.47	21.44
David A. Carson	7-8-66	192.83	198.79	5.96	.17	5.79
Wilfred T. Smith	9-20-66	214.35	234.90	20.55	.63	19.92
Reinhold Kretchman	10-14-66	272.85	274.91	2.06	.07	1.99
Wallace E. Taylor	1-3-67	210.97	228.69	17.72	.80	16.92
Lloyd V. Naylor	1-4-67	244.25	253.11	8.86	.32	8.54
John J. Hegener	1-6-67	285.75	293.83	8.08	.29	7.79
William J. Buskey	1-21-67	229.99	234.09	4.10	.17	3.93
William J. Schannel	6-3-67	193 11	210.42	17.31	.92	16.39
Frederick Paton, Jr.	6-29-67	223.76	234.87	11.11	.51	10.60
Charles R. Christensen	7-8-67	293.52	315.51	21.99	.92	21.07
Charles Bianchi	7-20-67	256.26	268.27	12.01	.50	11.51
Alfred L. Schroeder	7-27-67	210.77	231.49	20.72	1.00	19.72
Julius M. Noble	8-3-67	194.12	245.38	51.26	2.43	48.83
Cornelius T. Clancy	10-5-67	320.30	333.52	13.22	.57	12.65
Frank R. Otersen	11-2-67	332.50	334.15	1.65	.07	1.58
Edward Gurriell	11-15-67	257.91	259.84	1.93	.09	1.84
Leslie Winsor	12-19-67	242.13	245.15	3.02	.15	2.87
Emil J. Battaline	1-20-68	319.72	325.32	5.60	.24	5.36
Alfred L. Abel	2-17-68	260.22	260.86	.64	.03	.61
George Delle Donna	3-9-68	189.79	201.62	11.83	.58	11.25

* Excluding the effect, if any, of Survivorship Options and Supplemental Payments.

Affidavit of Benjamin Percario in Support of Notice of Motion

Name	*Date Pensioned*	*Monthly Pension*	*Female Monthly Pension*	*Monthly Diff.**	*Monthly Damages Awarded 7/2/65 5/1/67**	*Monthly Diff. Remaining**
George A. Stevens	4-6-68	246.22	253.65	7.43	.35	7.08
Theodore R. Tomlinson	4-30-68	336.07	366.64	30.57	1.19	29.38
Lee Plesinger	6-29-68	249.37	258.80	9.43	.45	8.98
James D. Wager	9-4-68	220.00	224.33	4.33	.21	4.12
Edward W. Lockard	9-7-68	249.16	263.19	14.03	.63	13.40
Edward R. Breece	12-5-68	347.98	371.34	23.36	.95	22.41
William I. Battin, Jr.	1-14-69	189.20	237.22	48.02	2.43	45.59
Walter Thomas	5-1-69	287.76	304.57	16.81	.68	16.13
Welcome T. Williams	5-21-69	150.22	160.33	10.11	.68	9.43
Raymond E. McNeeley	8-12-69	298.73	326.68	27.95	1.28	26.67
Walter R. Winter	8-12-69	271.19	276.42	5.23	.24	4.99
John F. Blewett	10-15-69	260.66	274.93	14.27	.67	13.60
Frank Renn	11-21-69	253.17	267.61	14.44	.73	13.71
William J. Barnes	1-7-70	265.87	288.17	22.30	1.11	21.19
William R. VanDuyne	7-6-70	352.28	358.07	5.79	.26	5.53
William C. Carter	8-10-70	174.17	201.96	27.79	1.64	26.15
Ralph J. Williams	8-25-70	344.04	372.76	28.72	1.23	27.49
William A. Beckmann	2-5-71	232.42	245.41	12.99	.90	12.09
Franklin B. Lawson	4-2-71	283.64	293.58	9.94	.52	9.42
Joseph L. Dorso	6-1-71	238.77	259.38	20.61	1.34	19.27
Hugo V. Cassella	6-8-71	351.09	369.48	18.39	.91	17.48
W. Howard Lauer	6-21-71	232.81	252.12	19.31	1.31	18.00
John A. Dawson	7-9-71	180.76	195.26	14.50	1.25	13.25
John C. Pearthree	9-23-71	392.91	423.62	30.71	1.46	29.25
George F. Wimmer, Jr.	11-29-71	359.36	369.33	9.97	.45	9.52
Elmer W. Herget	11-29-71	254.54	276.23	21.69	1.39	20.30
Alfred Bissinger	12-10-71	358.61	380.88	22.27	1.05	21.22
William J. Schnable	12-10-71	336.84	344.48	7.64	.40	7.24
Albert Church	12-30-71	420.52	455.61	35.09	1.55	33.54
David J. Burton	1-1-72	358.15	359.75	1.60	.08	1.52
Andrew L. Dudak	1-24-72	314.51	342.04	27.53	1.38	26.15

* Excluding the effect, if any, of Survivorship Options and Supplemental Payments.

Affidavit of Benjamin Percario in Support of Notice of Motion

Name	*Date Pensioned*	*Monthly Pension*	*Female Monthly Pension*	*Monthly Diff.**	*Monthly Damages Awarded 7/2/65 5/1/67**	*Monthly Diff. Remaining**
William R. Canning	3-8-72	378.00	388.28	10.28	.53	9.75
Harry J. Mason	5-8-72	276.53	312.26	35.73	2.04	33.69
Edward A. Keafer	7-10-72	380.17	383.99	3.82	.18	3.64
George Doorley	7-10-72	367.28	370.95	3.67	.19	3.48
Wilbur Rush	7-10-72	401.19	428.94	27.75	1.28	26.47
Leroy Brundage	9-7-72	485.04	491.04	6.00	.26	5.74
George M. Metz	1-2-73	526.04	555.51	29.47	1.33	28.14
John B. Grey	1-5-73	364.99	390.72	25.73	1.25	24.48
John W. Johnson	1-5-73	278.55	286.54	7.99	.68	7.31
Alexander Weir	1-25-73	367.83	389.91	22.08	1.46	20.62
George A. Bish II	2-21-73	354.00	364.15	10.15	.55	9.60
William R. Hennessey	3-2-73	337.97	362.57	24.60	1.50	23.10
Paul Felekey	3-7-73	419.16	421.44	2.28	.12	2.16
Joseph K. Wright	5-8-73	410.21	415.15	4.94	.23	4.71
Howard F. Kilpatrick	6-1-73	345.28	368.06	22.78	1.28	21.50
Peter P. Sexton	7-10-73	178.87	185.39	6.52	.57	5.95
John S. Huston	7-11-73	415.36	433.93	18.57	.98	17.59
Maurice Sissman	10-3-73	405.11	439.34	34.23	1.66	32.57
Nicholas J. Tintle	12-7-73	282.62	300.30	17.68	1.46	16.22
Arthur C. Watts	12-21-73	500.69	511.74	11.05	.50	10.55
Dennis J. Holland	9-7-67	215.23	231.89	16.66	.83	15.83
Theodore Gross	12-28-67	265.27	295.88	30.61	1.41	29.20
Harry T. Comiskey	3-6-70	373.14	379.39	6.25	.26	5.99
Lawrence M. Salvato	10-16-72	457.45	484.04	26.59	1.31	25.28
Harvey C. VanDerbeek	3-16-73	498.82	502.10	3.28	.15	3.13
Eugene J. Phillips	1-10-74	369.36	420.22	50.86	2.55	48.31
Albert A. Hansell	5-20-74	545.85	549.32	3.47	.17	3.30
Bruce Morecraft	1-8-74	428.03	457.34	29.31	1.48	27.83
Joseph V. Lenox	2-6-74	452.67	458.40	5.73	.32	5.41
Stewart A. Zabriskie	2-11-74	349.80	375.84	26.04	1.74	24.30
Harry T. Gross	4-24-74	386.80	444.86	58.06	3.38	54.68
Ellis F. Ziesse	8-2-74	369.85	370.96	1.11	.07	1.04
Stephen Koske	9-13-74	360.66	369.42	8.76	.59	8.17
John Farley	9-24-74	495.88	501.70	5.82	.27	5.55
Robert E. Lohmann, Jr.	11-6-74	378.74	453.77	75.03	4.09	70.94
James R. McShea	12-6-74	607.61	634.19	26.58	1.30	25.28
Andrew O. Anderson	12-31-74	421.71	424.31	2.60	.14	2.46

* Excluding the effect, if any, of Survivorship Options and Supplemental Payments.

Affidavit of Benjamin Percario in Support of Notice of Motion

DAMAGES DUE DECEASED U.C.A. MALE EMPLOYEES THAT RETIRED EARLY

Name	*Date Pensioned*	*Monthly Pension*	*Female Monthly Pension*	*Monthly Diff.**	*Monthly Damages Awarded 7/2/65 5/1/67**	*Monthly Diff. Remaining**
Stanley H. Apgar	5-2-66	$183.96	$228.52	$44.56	$ .96	$43.60
Charles Farr	8-6-66	216.85	228.26	11.41	.31	11.10
J. William Marsden	7-27-67	252.32	259.41	7.09	.33	6.76
Charles M. Piano	12-4-67	233.87	256.66	22.79	1.07	21.72
Daniel R. Hogan	3-9-68	181.89	228.06	46.17	2.20	43.97
Paul Dzina	1-4-69	237.49	250.08	12.59	.63	11.96
Edmund F. Allen	1-22-69	186.99	202.36	15.37	.95	14.42
George M. Satterthwaite	10-6-69	265.04	270.77	5.73	.28	5.45

* Damages due the designated beneficiary under post-retirement survivorship option 2 of deceased U.C.A. male employee that retired early.

Name	*Benefit Eff. Date*	*Present Monthly Benefit*	*Monthly Benefit if Beneficiary of Female**	*Monthly Diff.**	*Monthly Damages Awarded 7/2/65 5/1/67**	*Monthly Diff. Remaining**
Margaret Hogan	11-10-71	$ 75.97	$ 99.06	$23.09	$1.10	$21.99

* Excluding the effect, if any, of Survivorship Options and Supplemental Payments.

Opinion of the United States District Court for the District of New Jersey

(Filed—August 25, 1970)

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Defendant.

Civil Action No. 245-66

MORGAN SWEENEY and UTILITY CO-WORKERS ASSOCIATION,

Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Defendant.

Civil Action No. 955-68

Appearances:

GEORGE DUGGAN, Esq.
Attorney for Plaintiffs

LUKE A. KIERNAN, JR., Esq.
Attorney for Defendant

Opinion of the United States District Court for the District of New Jersey

OPINION

WORTENDYKE, District Senior Judge:

Both of the captioned cases were instituted under the Civil Rights Act of 1964, 78 Stat. 241, §703(a)(1), 42 U.S.C. §2000e-2(a)(1). Both cases require a determination of whether or not a non-contributory pension fund, which treats males and females differently, violates the provisions of 42 U.S.C. §2000e-2. In the first of these actions (C. 245-6) this Court, on March 19, 1968, entered an Order for summary judgment, from which the plaintiffs in that cause appealed to the United States Court of Appeals for the Third Circuit. The judgment appealed from was vacated and the cause remanded to this Court for further proceedings consistent with the Opinion of the Appellate Court. Its decision of April 1, 1969 is reported in 409 F. 2d commencing at page 775. The Appellate Court directed that this Court

> "• • • insofar as the original complaint is concerned, [determine] • • • whether any of the named appellants and any other male members of the union, may have retired between the date of the initial 1965 charges before the EEOC and the May 1, 1967 change, and thus may have been harmed by the alleged discrimination in the pension benefit formula;"

and stated that

> "Such a finding • • • would require the court to rule on whether the original pension plan, prior to its modification, violated Title VII of the Civil Rights Act of 1964."

Opinion of the United States District Court for the District of New Jersey

The same Opinion concludes that

> "• • • if no male employee was harmed by the pre-May 1967 pension plan, that should dispose of the original complaint and injunctive relief is unnecessary."

Pending the decision of the Court of Appeals in Civil 245-66, Morgan Sweeney and Utility Co-Workers Association, as plaintiffs, instituted an action in this Court (Civil 955-68) against the same defendant in the case then on appeal. That action came to issue upon the answer of the defendant, filed October 29, 1968, and the Court of Appeals took notice of the pendency of that more recent action. At page 782 of its Opinion the Court of Appeals stated that

> "• • • we have already noted that a second suit has been filed duplicating the charge that the modified [pension] plan violates Title VII. Because this second suit has not yet been disposed of, and because it deals with precisely the same substantive issues as the amendment to the original complaint, we deem it unnecessary to determine whether the grant of summary judgment as to that portion of the first complaint was in error. [Footnote 1]). It was suggested at oral argument that consolidation of the two actions, i.e., the original complaint as

---

[1] [Footnote 23 in the Opinion of the Court of Appeals]. "We also deem it unnecessary therefore to determine whether, as appellants contend, the discrimination alleged in the modified pension plan was in fact a partial continuation of the discriminatory scheme of the original pension plan."

amended and the second complaint, would be sought if this court directed a remand. We believe that this would be the proper procedure to follow and that upon such consolidation the issues involved in the initial complaint, the amendment thereto, and the second complaint, can be sifted out and disposition made of them. [Footnote 2], and [Footnote 3].

---

[2] [Footnote 24 in the Opinion of the Court of Appeals]. "* * * While the appellee has stated it would not raise any jurisdictional objections to the second suit * * * the district court has the right, of course, to raise the question of jurisdiction in the broad sense of that term, *sua sponte*. In view of the fact that appellants have filed a charge with the EEOC against the *modified* pension plan, and the EEOC *pursuant to appellants' request* has authorized the institution of a civil suit on this charge, * * * the necessary prerequisites for court action appear to have been met according to the authorities cited in note 11, *supra*."

[3] [Footnote 25 in the Opinion of the Court of Appeals]. "* * * The applicability of Title VII to pension plans, particularly as related to the prohibition against discrimination on account of sex, will no doubt have to be determined in the second suit pending between the parties even if the original complaint is found to be moot. Furthermore, if appellants prevail in the second suit, there may emerge a pattern of discrimination which could conceivably call for injunctive relief.

All we decide today is that on the record in this appeal the powerful remedy of injunction is not warranted to provide protection from the discriminatory practice alleged in the original complaint. With respect to the second suit and the amendment to the first complaint, which should no doubt be consolidated for trial, we believe (without completely foreclosing the matter) that the issues are ripe for disposal on the merits."

Pursuant to the mutual undertakings of counsel at the joint conference on October 20, 1969, in both cases, a stipulation of facts and agreement of the parties was filed in the consolidated actions on June 17, 1970. By the terms thereof the parties "agree to submit the above matters on the foregoing Stipulation and the Briefs of the attorneys for the respective parties, without oral argument." In that Stipulation the following facts appear:

Defendant is a public utility corporation existing under the laws of the State of New Jersey, engaged in the manufacture, sale and distribution of gas and electric energy, with its principal place of business in the City of Newark, New Jersey.

Plaintiff Utility Co-Workers Association (Union) is an independent union having its office in the same City and duly certified by the National Labor Relations Board as the collective bargaining representative for certain employees in all of defendant's commercial offices on January 10, 1949.

On January 10, 1911 defendant instituted a welfare plan for all of its employees. That plan included a retirement or pension plan, non-contributory in character, i.e., involving no contribution thereto by employees. Attached to the Stipulation and marked joint exhibit No. 1, is a copy of the negotiated collective bargaining agreement between the parties, dated June 21, 1965, effective May 1, 1965, which includes the negotiated supplementary agreements respectively effective May 1, 1967 and May 1, 1969. There is also attached to this Stipulation, and bearing exhibit No. 2, a copy of the pension plan in effect prior to May 1, 1967 as well as a copy of the pension plan as modified

or revised effective from May 1, 1967, marked joint exhibit No. 3.

Between July 1, 1965 and May 1, 1967 there were early retirements on pension by some male employees, members of the plaintiff Union, as well as during the period from May 1, 1967 to the date of the Stipulation.

At the time of the institution of C. 245-66 by Rosen, Sweeney and the Union on March 10, 1966, and since 1911, male employees were eligible for retirement at age 65, with 25 years service, and with mandatory retirement at age 70. Male employees were eligible for retirement at age 60 with 30 years service at a reduced pension. The female employees during the same period could retire, without reduction in pension, at age 60 with 20 years service and mandatory retirement at age 65.

At the time of the institution of C. 245-66 the plaintiff Union and the defendant were parties to a then current labor agreement which, by its terms expired on April 30, 1967. On January 24, 1967 plaintiff Union and defendant commenced collective bargaining negotiations for certain revisions of the existing Pension Plan. Those negotiations ripened into a new labor agreement which replaced the agreement which would expire on April 30, 1967. That new agreement was duly ratified by the membership of the Union and executed by the parties thereto on July 17, 1967, effective retroactively from May 1, 1967. That agreement included the following provisions:

"Section 3. Normal Retirement for Age

(1) Each employee may at his or her option retire at age sixty-five or thereafter, and must retire at age seventy.

(2) Each employee who retires under the provisions of this Section 3 shall be paid for life, in monthly installments, a pension computed at the annual rate of 1% of the average annual compensation of such employee for the five years of highest earnings within the last ten years of the employee's service, multiplied by the number of years, and any fraction of a year, of the employee's service.

Section 4. Early Retirement

(1) Each employee may at his or her option retire at age sixty or thereafter but before attainment of age sixty-five upon completion of twenty years of service.

(2) Each employee who retires under the provisions of this Section 4 shall be paid for life, in monthly installments, a pension computed at the annual rate of 1% of the average annual compensation of such employee for the five years of highest earnings within the last ten years of the employee's service, multiplied by the number of years, and any fraction of a year, of the employee's service, and reduced by one-quarter of 1% for each month that such employee is less than age sixty-five one-quarter of 1% for each month that such at the time of retirement and by an additional employee is less than age sixty-two at the time of retirement, except that in the case of a female employee who retires under the provisions of this Section 4, no reduction in

> the amount of the pension shall be made on account of service prior to May 1, 1967."

The Union and the defendant commenced further collective bargaining negotiations for a new agreement on April 1, 1969. That agreement, which was duly ratified by the union membership, became effective for the period May 1, 1969 to April 30, 1971. By its terms the parties agreed "to permit a vesting of the pension benefits for any member whose service with the company is terminated for any reason and who has attained the age of 50 and completed at least 15 years of service."

Plaintiff Rosen retired from his employment with the defendant on September 9, 1966 at the age of 65 with full pension.

The parties stipulated that this Court has jurisdiction to hear and determine the issues involved in the above captioned cases upon the record herein consisting of the items contained in the stipulation, all pleadings filed in the captioned cases, the exhibits, if any, attached thereto, and the pretrial conference orders. Counsel for the respective parties agreed that they might refer to and use excerpts from the Congressional Record relating to the Civil Rights Act of 1964 and any matters related thereto.

Inland Steel Co. v. *National Labor Relations Board,* 170 F. 2d 247 (7 Cir. 1948), cert. granted 336 U.S. 960 (1949), affirmed 339 U.S. 382, held that "a retirement and pension plan is included in 'conditions of employment' and is a matter for collective bargaining" and that the employees' retirement and pension plan was part of the subject matter of compulsory collective bargaining within the meaning of the National Labor Relations Act. The Court, at page 250 of the Opinion in *Inland Steel,* stated that section 8(a)(5) required an employer to bargain collectively with the representative of his employees, subject to the provisions of Sec. 9(a) which provides that the duly selected representative of the employees in an appropriate unit shall be their exclusive representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. See also *Retail Clerks Union, No. 1550* v. *N.L.R.B.* (D.C. Cir. 1964), 330 F 2d 210, 215, cert. den. 379 U.S. 828 (1964).

On January 24, 1967 plaintiff Union and the defendant commenced collective bargaining negotiations for certain revisions of the existing pension plan after a charge had been filed with the EEOC alleging that Public Service was committing an unlawful employment practice, within the meaning of Title VII of the Civil Rights Act of 1964, by maintaining a pension plan that discriminated on the basis of sex, because it permitted retirement at different ages and length of service for men and women. Upon these charges, and following an investigation, the Commission issued a decision, dated January 26, 1966, finding reasonable cause to believe that the pension plan did violate Title VII. By letter dated February 9, 1966, the Director of Compliance of the Commission informed employee Rosen that such reasonable cause had been found and that the Commission would attempt to eliminate the practice by conciliation. By a subsequent letter dated February 9, 1966, the Director advised Rosen that conciliation would be undertaken and continued by the Commission. Thereafter on March 10, 1966 the earlier action (C. 245-66) was commenced in this Court.

As will appear from the Stipulation in the present actions, there existed a collective bargaining agreement between the Union and defendant which, by its terms, expired on April 30, 1967. In anticipation of such expiration, as will also appear from the stipulation herein, the Union and the defendant on January 24, 1967 commenced collective bargaining negotiations for a new agreement, to succeed that which would expire on April 30, 1967, and in those negotiations the Pension Plan was revised in a resulting new agreement between the Union and the employer which became effective, retroactively, to May 1, 1967 and terminated April 30, 1969. The terms and provisions of the collective bargaining agreement which took effect May 1, 1967, have already been hereinabove at length set forth. The provisions thereof relating to retirement and pensions were duly ratified by the members of the Union and constituted the final fruits of the negotiations between the employer and the representatives of the Union acting in behalf of the employees. Stipulation, par. 6; Joint Exhibit No. 1.

The defendant argues that because the proceedings before the EEOC were completely *ex parte* and non-adversary, the statements and conclusions of the Commission are not binding upon this Court. Defendant contends that this Court is now confronted with "the threshold question of whether Title VII was ever intended to reach pension or retirement plans." In support of its contention that Title VII of the Civil Rights Act of 1964 does not apply to retirement or pension plans defendant relies heavily upon *Gruenwald* v. *Gardner,* 390 F. 2d 591 (2 Cir. 1968), cert. den. 393 U.S. 982 (1968). Although the opinion in that case stated that "the trend of authority

makes it clear that the variation in amounts of retirement benefits based upon differences in the attributes of men and women is *constitutionally* [emphasis supplied] valid. • • • The appellant does not press his argument that the section in question is violative of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1964), 78 Stat. 253 (1964), but we find that that contention is also without merit." The complaint in *Gruenwald* alleged that certain provisions of the Social Security Act were unconstitutional in that women were accorded more favorable treatment than men in computing social security payments. The Court held that such provision did not constitute "invidious discrimination nor violate either the due process or equal protection clause." In *Gruenwald,* the statute in question dealt with assistance to the aged under the Social Security Act and not private pension plans. The Second Circuit found that the benefit differentials were not an invidious discrimination since they sought to *reduce* the disparity between the economic and physical capabilities of men and women. No such disparity has been shown to exist in this industry. Congress, in the Old Age Assistance program, was creating a broad national policy based on overall national problems and considerations. In the case at bar, the discrimination emanates from one pension plan in one company in one industry in a given, limited geographical area. Congress, of course, has a wider latitude in creating exceptions to its own laws. A private company cannot invoke the prerogatives of the Congress—especially when it fails to present any justification for its action.

The Court of Appeals in *Rosen* (409 F. 2d 775) agreed with appellant that:

> "[T]he original complaint was not mooted by the May 1, 1967 revision in the pension plan because of the possibility that some employees may have suffered money damages before the change was made."

Accordingly, the case was remanded.

> "for a determination as to whether any of the named appellants, and any other male members of the union may have retired between the date of the initial 1965 charges before the EEOC and the May 1, 1967 change, and thus may have been harmed by the alleged discrimination in the pension benefit formula. Such a finding, of course, would require the court to rule on whether the original pension plan, prior to its modification, violated Title VII of the Civil Rights Act of 1964.
>
> If the district court does not find any party entitled to the kind of relief above described for harm caused by alleged discrimination prior to the May 1, 1967 pension plan revision, then we agree with the appellee that the issues raised in the *original* complaint are moot."

What complicates the questions now confronting this Court are the alleged oral amendment of the original complaint and the consolidation of that complaint with the new case of *Sweeney* (C. 955-68). In *Sweeney,* the plaintiffs contend that the attempted elimination of the discrimination alleged to exist under the original plan was offset by so much of the revised plan as was embodied in the exception contained in Section 4(2) which

states that "in the case of a female employee who retires under the provisions of this Section 4, no reduction in the amount of the pension shall be made on account of service prior to May 1, 1967."

I find that the plan as it existed prior to the revision of May 1, 1967 violated Title VII of the Civil Rights Act of 1964 by discriminating against male employees in favor of female employees on no other apparent basis than that of sex. However, I also find that the revision of the plan, effective May 1, 1967, eliminated the discrimination against male employees which existed under the previous plan, but favored female employees to the extent that it eliminated provisions for the reduction in the amount of their pensions on account of service prior to May 1, 1967. I find that the foregoing exception in favor of female employees constituted a discriminatory violation of Title VII. The effect of this exception may be illustrated by the following chart:

1965 *Original Pension Plan*

MALE 60 years of age

$10,000 average annual salary
30 years employment
$10,000 x 1% x 30 years = $3,000 full pension if retirement was at 65
$3,000 x 24% (penalty) = $720
3,000.00 full pension reduced by
720.00 penalty for early retirement

$2,280.00

Pension = $2,280.00

Opinion of the United States District Court for the District of New Jersey

FEMALE 60 years of age

$10,000 average annual salary
30 years employment
$10,000 x 1% x 30 years = $3,000 full pension
NO REDUCTION FOR EARLY RETIREMENT

Pension = $3,000.00

1968 (After May 1, 1967) *Amended Pension Plan*

MALE 60 years of age

$10,000 average annual salary
30 years employment
$10,000 x 1% x 30 years = $3,000 full pension if retirement was at 65
$3,000 x 21% (new penalty) = $630
$3,000.00 full pension reduced by
630.00 penalty for early retirement

$2,370.00

Pension = $2,370.00

FEMALE 60 years of age

$10,000 average annual salary
30 years employment
$10,000 x 1% x 30 years = $3,000 full pension
As of May 1, 1967
$10,000 x 1% x 29 years = $2,900.00 pension as of May 1, 1967
$10,000 x 1% x 1 year (period between May 1, 1967 and retirement date in 1968) = $100.00

Opinion of the United States District Court for the District of New Jersey

$100.00 x 21% (penalty applied to sums earned after May 1, 1967) = $21.00
$100.00 — $21.00 = $79.00 pension + $2900.00 (pension May 1, 1967)

Total Pension as of 1968 = $2,979.00

PENSION PAYMENTS PER ANNUM

Male	*1965*	*1968*
60	$2,280.00	$2,370.00
Female		
60	$3,000.00	$2,979.00

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate between employees with respect to "• • • compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. §2000e-2(a)(1). Differentiation between male and female on the basis of sex is not *per se* illegal in cases in which sex is an occupational qualification reasonably necessary to the normal operation of that particular business. *Bowe* v. *Colgate-Palmolive Company*, 272 F. Supp. 332, 360 (S.D.Ind. 1967), reversed in part at 416 F. 2d 711 (1969). The burden of proving such occupational qualification is on the employer. *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (5 Cir. 1969). Likewise in determining and implementing the terms, conditions or privileges of employment, any differentiation between employees of different sexes must rest upon something more than the fact that one employee is a male and the other is a female. An employer, to justify discrimination in this area,

must demonstrate to the Court that there is [in fact] a reasonable basis that the differentiation between male and female in the company pension plan is based on something more than just sexual differences. *id.* at 235. Defendant has advanced no such difference. Why should women be allowed to retire earlier than men—at full pension? Are these differentiations based on merit? quality or quantity of service? aptitude? need? These questions remain unanswered.

The Equal Employment Opportunity Commission found defendant's original pension plan to be in conflict with the provisions of Title VII. Guidelines in this area, issued by the Commission, in 1968, after the filing of these actions, clearly barred differences in optional or compulsory retirement ages based on sex. *Federal Register,* Vol. 33, No. 38 at p. 3344. A ruling to the same effect had earlier been made by the Commission in this case. Such guidelines are entitled to considerable weight in construing a statute. *Udall* v. *Tallman,* 380 U.S. 1 (1965); *Weeks* v. *Southern Bell Telephone & Telegraph Co., supra,* at 235; *International Chemical Workers Union* v. *Planters Manufacturing Company,* 259 F. Supp. 365 (N.D. Miss. 1966). After reviewing Title VII, its legislative history and the cases decided subsequent to its enactment, this Court concurs with the judgment of the Equal Employment Opportunities Commission that differences in retirement plans, be the plan optional or compulsory, are violative of Title VII of the Civil Rights Act of 1964.

The Civil Rights Act of 1964 is set forth on pages 287 through 319 of the United States Code Congressional and Administrative News, 88th Congress. The Legislative History of the Act as a whole is found on pages 2355 through 2519 of the same compilation, but makes no reference to the inclusion of "sex" as a criterion of the proscribed discrimination. The word is well understood and therefore requires no construction for an interpretation of the sentence of which it forms a part. It must be taken at its commonly accepted meaning. *Georgia Power Co.* v. *Equal Employment Opportunity Commission,* 412 F. 2d 462 (5 Cir. 1969). In *Phillips* v. *Martin Marietta Corporation,* 411 F. 2d 1 (5 Cir. 1969) cert. granted 397 U.S. 960 (March 3, 1970) a summary judgment for the employer was affirmed in a holding that "the words of the statute are the best source from which to derive the proper construction" where the court found that "a perusal of the record in Congress will reveal that the word 'sex' was added to the bill only at the last moment and no helpful discussion is present from which to glean the intent of Congress.[4]

[4] The word "sex" was not part of the Civil Rights Bill when it left the House Rules Committee on January 30, 1964. The actual amendment was offered by Congressman Smith (D.Va.), a critic of the Bill, and commentators generally agree that the addition was designed to sabotage the Bill. See: *Sex Discrimination in Empoyment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964,* 1968 *Duke L. J.* 671 at 676; Vaas, Francis J., *Title VII: Legislative History, 7 Boston College Ind. and Commerce L. Rev.* 431; Comment, 50 *Iowa L.R.* 778 at 789 et seq. (1965). Hearings were never held on the amendment and the failure to do so was noted with alarm by the Chairman of the House Judiciary Committee, Mr. Celler (D. N.Y.), 110 Cong. Record 2485 (February 8, 1964). Indeed, in the House the amendment was opposed by the Administration and many supporters of the whole bill. 1968 *Duke L.J. supra,* at 677-78; 7 *B.C.*

(Footnote continued on following page)

Under the language of 42 U.S.C. §2000e(a)(1) defendant's pension plan, established in 1911, discriminated against its male employees on the basis of sex by permitting retirement at different ages and length of service for men and women. The May 1, 1967 revision of the collective bargaining agreement between defendant and the representatives of its employees does not completely avoid violation of the Civil Rights Act because that revision included the following phrase in Section 4(2) thereof:

> "except that in the case of a female employee who retires under the provisions of this Section 4, no reduction in the amount of the pension shall be made on account of service prior to May 1, 1967."

That exception perpetuates the discriminatory features of the earlier plan by continuing to grant higher pension benefits to women, hired prior to May 1, 1967, than are

---

(Footnote continued from preceding page)

Ind. & Comm. L. Rev. supra, at 441-42. Five Congresswomen, however, did support the amendment and one of them, Congresswoman Kelley of New York stated that "* * * we seek equal opportunity in employment for *women*. No more—no less." 1968 *Duke L.J. supra,* (quoting from the *Congressional Record*), at 677. The word "sex" was adopted by a vote of 168 to 133 and attempts to qualify the clear word "sex" by amendments were rebuffed. *id.* at 678. In the Senate, the bill, as amended, received both more favorable treatment and Administration support through Senators Humphrey, Mansfield, Kuchel and Dirksen, 7 *B.C. Ind. § Comm. Law Rev. supra,* at 455. Nevertheless, hearings were never held and debate concentrated largely on the racial provisions of the bill. The Senate did broaden the provisions in what is now §2000e to cover all agencies as well as private employers. *id.* at 445.

granted to men hired at the same time. The criticized exception must be rescinded as violative of the Civil Rights Act.

Certainly Congress envisioned that difference would exist, such as in the area of benefits to widows of widowers of employees, but such differences, it seems, must be based on factors other than sex. Indeed, in 1963, one year before the passage of the Civil Rights Act of 1964, Congress declared it illegal to discriminate between similarly-situated employees, on the basis of sex, with regard to wages unless such differential was based upon a factor other than sex. 29 U.S.C. §206(d). The Civil Rights Act of 1964 was apparently designed to supplement this earlier legislation. See: *Congressional Record,* Debate of June 12, 1964. Defendant urges that Congress, in enacting Title VII, never intended to have that section used to reduce benefits already accorded to women. In support of this argument, defendant produces a letter from former Senator Humphrey, the floor manager of the bill in the Senate, to a Mr. Nicholls of the Northwestern Bell Telephone Company. The letter states that Title VII was, in part, designed to improve the employment status of women and that "* * * it would be a gross distortion of the provisions of Title VII to apply this language in a manner which impaired existing pension, retirement, or benefit programs." Plaintiffs respond that equalization need not impair women's retirement benefits and argue that the collective bargaining agreements bar such impairment. The debates in Congress neither support nor refute Senator Humphrey's letter. Congress certainly sought to better the employment status of women. Whether or not Congress sought to give women special privileges is unclear.

It seems unlikely that Congress would enact a statute banning discrimination based on sex and in doing so mean to grant special privileges to one sex at the expense of the other. Title VII rejects the notion of "romantic paternalism" towards women and seeks to place them on *equal* footing with men. *Weeks* v. *Southern Bell Telephone & Telegraph Company, supra,* at 236. The Pension Plan, as it existed prior to May 1, 1967, and those parts of the amended Plan, as noted above, therefore, are in conflict with the language and spirit of 42 U.S.C. §2000e-2(a).

The plans in question were part of the negotiated collective bargaining agreements between defendant and the representatives of its employees. The degree of mutuality of acceptance is contested. Whether the plans were contractually agreed upon or not is irrelevant since private parties cannot agree to perform illegal acts. *United Mine Workers of America* v. *Pennington,* 381 U.S. 657 (1965); *United Brotherhood of Carpenters and Joiners of America* v. *United States,* 330 U.S. 395 (1947); *Local 53 of the International Association of Heat and Frost Insulators and Asbestos Workers* v. *Vogler,* 407 F. 2d 1047 (5 Cir. 1969) (Congress, under the Commerce Clause, may invalidate private agreements violative of the Civil Rights Act).

The defendant argues that even if the original pension plan is void, the 1967 amended plan cures any illegality and that the exception therein merely recognizes rights accrued prior to the revision of the pension plan. The exception in the 1967 amended plan envisions a phasing out of the discriminatory pension system. Gradual improvement of employment opportunities does not in and of itself constitute compliance with Title VII. *United States* v. *H. K. Porter Company,* 296 F. Supp. 40, 59 (N.D.Ala. 1968). Title 42 U.S.C. §2000e-5(g) requires that if the court finds an intentional unlawful employment practice, it may enjoin the respondent from participating in such practice and order such affirmative action as seems appropriate. A Court is not limited to barring only present and future wrongs but may act to eliminate the present effects of past discriminations. *Local 53 of Int. Assn. of Heat & Frost I & A Workers* v. *Vogler, supra,* at 1052-53; *Dobbins* v. *International Brotherhood of Electrical Workers AFL-CIO,* 292 F. Supp. 413 (D.C. Ohio, 1968). In shaping a decree in this area, a District Court has wide discretion. *id.* at 452.

According to the terms of the pension plan, retirement benefits were and are not non-contributory, i.e. the entire expense of the Welfare Plan is borne by the Company. *Joint Exhibit No. 3.* The pension plan is administered by the Company, which can discontinue the plan at any time though it must provide for employees and beneficiaries of former employees. *id.* at 10 and 11. The pension plan can be amended by the company but there is a conflict between Section 15 of *Joint Exhibit No. 3* and Article XVII, Section 1(a) of *Joint Exhibit No. 1* as to whether or not benefits can be reduced in order to conform with governmental requirements. This question and the question of whether or not the pension is compensation, although excluded as such under the pension plan (*Joint Exhibit No. 3,* Section 1(7)) are not before this Court.

The New Jersey Supreme Court has held that a pension plan is not a "mere ephemeron and the promise to pay a pension upon performance of the fixed terms a mere illusion." *Stopford* v. *Boonton Molding Company* 265 A. 2d 657 at 665 (N.J.Sup. Ct. 1970). If an employee, in this State, performs all of the conditions precedent to a pension plan he acquires a vested right to an agreed upon lifetime pension. *id.* at 655. Termination cannot operate retroactively so as to cut off previously accrued funding obligations. *id.* at 665. Whether or not the benefits under this plan vested prior to 1967 is irrelevant to the determination of the legality of such plan pursuant to the Civil Rights Act of 1964. This Court will not and cannot renegotiate a labor agreement for these parties—its function is limited to determining whether or not the present pension plan complies with the provisions of the federal civil rights statute. Having found that these pension plans discriminate against male employees solely because of their sex, and that such discrimination is not based on a rational business need or circumstance in this particular business, this Court must find that the provision violates the intent and language of Title VII of the Civil Rights Act of 1964.

Both parties have stipulated that damages would be assessable if this Court found the pension plan provisions in question to be illegal. Actual calculation of damage, it was agreed, would be undertaken by the parties and then submitted to this Court for review.

It is therefore on this 25th day of August, 1970,

ORDERED that, in light of the findings above, both parties submit to this Court a schedule of all male employees

who retired after July 1, 1965, under the age of sixty-five, including therein the amounts deducted from their incomes as penalty for early retirement.

It is further ORDERED that defendant Public Service Electric and Gas Company will immediately cease and desist from discriminating between male and female employees as to pension and retirements benefits.

REYNIER J. WORTENDYKE, JR.
United States Senior District Judge

Opinion and Order of the United States District Court for the District of New Jersey on Defendant's Motion for Rehearing and Reconsideration

(Filed—November 24, 1970)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Defendant.

Civil Action No. 245-66

MORGAN SWEENEY AND UTILITY CO-WORKERS ASSOCIATION,

Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Defendant.

Civil Action No. 955-68

Opinion and Order of the United States District Court for the District of New Jersey on Defendant's Motion for Rehearing and Reconsideration

Appearances:

GEORGE DUGGAN, Esq.
Attorney for Plaintiffs

LUKE A. KIERNAN, JR., Esq.
Attorney for Defendant

OPINION AND ORDER

WORTENDYKE, District Senior Judge:

Defendant, Public Service Electric and Gas Company moved, on October 13, 1970, for an Order granting a rehearing and reconsideration respecting this Court's Opinion in favor of plaintiffs herein, filed on August 25, 1970. On the argument of the motion, respective counsel were permitted to argue the merits of the aforementioned Opinion. In part, therefore, defendant's motion has been granted since the argument on the motion partially took the form of a rehearing and this subsequent opinion constitutes a reconsideration of the issues involved.

Defendant reiterated its prior contention that the 1967 revised pension plan presently in operation is not violative of Title VII of the Civil Rights Act of 1964. Under the present plan all employees, male or female, who opt for early retirement at age 60 suffer a 21% penalty reduction from their full pension; except however, the plan preserves for females added benefits for years worked prior to May 1, 1967,[1] which benefits have been described as antecedent or accrued rights.

---

[1] See Chart contained in this Court's Opinion, filed August 25, 1970, at p. 11.

Opinion and Order of the United States District Court for the District of New Jersey on Defendant's Motion for Rehearing and Reconsideration

Plaintiffs have maintained throughout this litigation that the preservation of these allegedly antecedent rights results principally in a perpetuation of the discriminatory practice under the former pension plan. This Court, in accord with that contention, stated in its Opinion of August 25, 1970, at p. 15:

> "That exception perpetuates the discriminatory features of the earlier plan by continuing to grant higher pension benefits to women, hired prior to May 1, 1967, than are granted to men hired at the same time."

Because the present plan continues to implement the effects of the prior discriminatory practice, the result is a present and future discrimination which is violative of Title VII of the Act, *United States* v. *Sheet Metal Workers Inc. Ass'n. Local U. 36,* 416 F. 2d 123 (8th Cir. 1969); *Griggs* v. *Duke Power Co.,* 420 F. 2d 1225 (4th Cir., 1970). The relief prayed for by the plaintiffs should, therefore, be granted.

Accordingly, this Court's Opinion, filed on August 25, 1970, is reaffirmed in all respects.

Therefore, it is on this 24th day of November, 1970,

ORDERED that the defendant's motion is denied and the Opinion of this Court filed on August 25, 1970 remains as the Opinion of this Court respecting all issues herein.

REYNIER J. WORTENDYKE, JR.
United States District Senior Judge

Supplemental Opinion of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Defendant.

Civil Action No. 245-66

MORGAN SWEENEY AND UTILITY CO-WORKERS ASSOCIATION,

Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Defendant.

Civil Action No. 955-68

Supplemental Opinion of the United States District Court for the District of New Jersey

Appearances:

GEORGE DUGGAN, Esq.
Attorney for Plaintiffs

LUKE A. KIERNAN, JR., Esq.
Attorney for Defendant

WORTENDYKE, District Senior Judge:

SUPPLEMENTAL OPINION

The nature of these actions is disclosed in my Opinion filed August 25, 1970 which found that the pension plan of the defendant Public Service in its collective bargaining agreement effective May 1, 1967, was violative of the provisions of the Civil Rights Act of 1964, 78 Stat. 241, §703(a)(1), 42 U.S.C. §2000e-(a)(1) (hereinafter the Act). In that Opinion and the Order implementing the same this Court determined that defendant's non-contributory pension plan treated male and female employees differently and thereby violated the provisions of the Act. The Opinion further stated that "both parties have stipulated that damages would be assessable [in favor of the plaintiffs and against the defendant] if this Court found the pension plan provisions in question to be illegal. Actual calculation of damages, it was agreed, would be undertaken by the parties and then submitted to this Court for review." Accordingly, the parties were directed to submit to this Court a schedule of the names and positions in employment of all male employees who retired after July 1, 1965 under the age of sixty-five, including therein the respective amounts deducted from their incomes as penalty for early retirement.

Supplemental Opinion of the United States District Court for the District of New Jersey

On August 11, 1970 the parties filed in this Court a written stipulation supplementing that previously filed on June 17, 1970. The supplemental stipulation provided that "if the Court resolves the meritorious issues favorable to plaintiffs, the Court, at a subsequent date, will determine whether any affirmative relief, i.e., damages, are recoverable in a case of this kind. Conversely if the Court resolves the said issues in favor of the defendant, a judgment for defendant will be entered thereon."

On February 19, 1970, upon due notice, the parties orally argued before the Court cross-motions respecting the issues of damages and the allowance of a counsel fee which had been expressly reserved in the Court's Order of August 25, 1970. In reserving decision upon the issues presented by the argument the Court informed the defendant that it might later be required to furnish the names of the retirees during the period in question.

Defendant argues that the authority of this Court to award damages by way of affirmative relief is found in 42 U.S.C. §2000e-5, and rests in the sound judicial discretion of the Court to be exercised where it is demonstrated by competent evidence that the person or persons complaining of the alleged discrimination have sustained pecuniary loss as a direct result of the discrimination found. Where, however, it cannot be shown with reasonable certainty that any damage resulted from the discrimination complained of there can be no recovery of damages. Plaintiffs have not discharged their burden of proving damages in this case. The burden of proof upon this issue required that evidence be presented to demonstrate that in the absence of the discriminatory provision of the negotiated pension plan, male employees would have

Supplemental Opinion of the United States District Court for the District of New Jersey

been entitled to retire without a reduction in pension benefits prior to the age of 65. The facts as stipulated by the parties disclose that the revised pension plan of May 1, 1967 fixed retirement ages for all employees at 65 years minimum, 70 years maximum, but with reduced pecuniary benefits, for service subsequent to May 1, 1967, for males opting for early retirement. The negotiated collective bargaining agreement which became effective May 1, 1969 left unchanged the revised plan of 1967 except for the change which permitted the "vesting" of pension benefits for all employees with fifteen years of service at age 50.

The uncontroverted evidence in this case is that the Union, acting in behalf of its entire membership, through collective bargaining negotiations followed by membership approval, adopted three successive labor agreements with the defendant from 1965 to 1969, and accepted the benefits prescribed thereunder. No evidence to the contrary having been produced this Court assumes that all male employees opting for early retirement during the period in question did so voluntarily. These certain male employees did, therefore, choose early retirement with the knowledge that they were doing so at reduced pecuniary benefits. The attainment of full pension rights could have been achieved by these individuals by continuing their employ with the defendant to age 65. Plaintiffs fail to refute this claim. The plaintiffs have failed to discharge their burden of proof in this matter since they have not shown that the discriminatory practice precluded any one of the members of the class from ensuring his maximum retirement benefits.

Supplemental Opinion of the United States District Court for the District of New Jersey

That portion of the Civil Rights Act dealing with affirmative relief, 42 U.S.C. §2000e-5(g),[1] invests the Court with wide discretion. The purposes of any relief deemed appropriate are to ensure compliance with the Act so as to terminate the practice and eliminate the present effects of past discrimination and make its victims whole. *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303 (5th Cir. 1970); *Bowe* v. *Colgate-Palmolive Company*, 416 F. 2d 711 (7th Cir. 1969); *Local 53 of Int. Ass'n. of Heat & Frost I. & A. Wkrs.* v. *Vogler*, 407 F. 2d 1047 (5th Cir. 1969). I am convinced that damages are not necessary to ensure compliance with my previous Opinion and Order. Moreover, increasing the pension benefits of these certain male employees who retired early would not serve to eliminate the present effects of past discrimination; rather it would increase the number of individuals who will be receiving full pension benefits for early retirement when hereafter no employee, be he male or female, will receive full pension benefits upon early retirement. It is beyond question that this pension plan discriminated against *all* male employees who attained the age of 60 during the period in question, not just those who elected early retirement. Those who retired early did so knowing full well the pecuniary benefits they would receive. This group claims to have been damaged since they received less benefits than females retiring early due solely to the discriminatory plan. But all those males who reached age 60 during the period and did not re-

---

[1] "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, *and order such affirmative action as may be appropriate,* * * *."

tire early were also discriminated against; for all these males were forced to continue working to age 65 if they sought to ensure maximum retirement benefits. Surely, they were as affected by the provisions of the plan as those who retired early at reduced pecuniary benefits; indeed it can be said that those who continued in employment until age 65 were caused to continue working up to 5 years longer than the early retirees. Yet, how are these individuals to be recompensed? The damages, if any, are not ascertainable for this class of employees.

All of the above mentioned factors have appealed to the Court's discretion. There is, however, a further item for consideration. The defendant's records disclose that during the period in question, being November 15, 1965 to the present, the following number of employees retired early: 6 females, 48 males. The great disparity in the number of male and female employees retiring early, together with the factors hereinabove considered, persuade this Court that this case is not one that calls for any affirmative relief by way of compensatory damages. This Court firmly believes that to grant damages to those male employees who retired early during the period would do nothing more than allow a windfall and a reward for having chosen early retirement to the detriment of those who worked considerably longer to obtain full pension rights and who cannot be recompensed for the discrimination that affected them as well.

The questions on this damage issue have caused me much concern. I do not, however, feel that the discriminatory practice complained of herein is the usual type of Title VII complaint. There is no charge of loss of wages,

promotions, etc. There have been no precedents to follow in respect to a charge of discrimination in a pension plan. The obscurity of the circumstances under which the term "sex" was included among the statutorily proscribed criteria for employment, and the absence of a clear-cut legislative history as far as this criterion is concerned, further contraindicates an award of damages. Ultimately the decision herein denying damages rests upon the invocation of this Court's discretion after considering the totality of the circumstances.

Plaintiffs also seek a reasonable attorney's fee as part of the costs of this action under the provisions of Title VII, Section 706(k) of the Act, 42 U.S.C. §2000e-5(k), which permits a court in any proceeding under the Civil Rights Act, in its discretion, to allow the prevailing parties a reasonable attorney's fee as part of the costs. See, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) and *Miller* v. *Amusement Enterprises, Inc.*, 426 F. 2d 534 (5th Cir. 1970). Counsel argues that the principal reason for awarding counsel fees as costs is that "plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits others in the same manner as himself"; citing *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). It is also argued that "reasonable attorneys' fees" should reflect not only an hourly compensation but also that the attorney's achievement in successfully prosecuting a new and difficult case has conferred benefits upon a class of individuals exceeding those by whom he is retained. *Freeman* v. *Ryan*, 408 F. 2d 1204 (D.C.Cir. 1968); *Brunwasser* v. *Suare*, 400 F. 2d 600 (4th Cir. 1968); *Featherstone* v. *Barash*, 382 F. 2d 641 (10th Cir. 1967).

Supplemental Opinion of the United States District Court for the District of New Jersey

In light of the circumstances and nature of the litigation and the number of hours spent thereon, I award $7,500.00 to plaintiffs' attorney as a reasonable attorney's fee.

Let an appropriate Order in conformity with the foregoing Opinion be submitted.

REYNIER J. WORTENDYKE, JR.
United States Senior District Judge

Order for Judgment of the United States District Court for the District of New Jersey

(Filed June 16, 1971)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Defendant.

Civil Action No. 245-66

MORGAN SWEENEY AND UTILITY CO-WORKERS ASSOCIATION,

Plaintiffs,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Defendant.

Civil Action No. 955-68

Order for Judgment of the United States District Court for the District of New Jersey

ORDER FOR JUDGMENT

The above cases coming on to be heard before this Court in the presence of George Duggan, Esq., attorney for plaintiffs, and Luke A. Kiernan, Jr., Esq., attorney for defendant, having been consolidated for the purpose of trial, and it appearing that the parties, through their respective attorneys, initially submitted for determination the issue of liability, i.e., whether the original 1965 pension plan and the early retirement provision of the revision thereof of May 1, 1967, violated Title VII of the Civil Rights Act of 1964 (78 Stat. 241, §703(a) (1), 42 U.S.C. §2000e-(a)(1)), and

It further appearing that said issues were submitted to the Court on a Stipulation of Facts, Exhibits and Briefs of the parties, without oral argument, and

It further appearing that the Court resolved said issues favorably to plaintiffs, i.e., the 1965 original pension plan and the exception contained in the early retirement provision of the revision thereof of May 1, 1967, violated the referred to statute for the reasons set forth in this Court's Opinion of August 25, 1970, and

It further appearing that subsequent thereto and within the prescribed period, defendant moved for a Rehearing and Reconsideration of the Court's Opinion on the referred to issue, and the Court having heard the oral argument of counsel for the respective parties, and having read the Briefs filed on the motion, reaffirmed its opinion on the said liability issue, and

It further appearing that pursuant to the Supplemental Stipulation of the parties, the Court set February 19,

Order for Judgment of the United States District Court for the District of New Jersey

1971, as a hearing date to determine whether any affirmative relief, i.e., damages, are recoverable in this case, and

It further appearing that the Court having heard and considered the oral arguments of counsel for the respective parties and the Briefs filed herein on the issue of damages, and being of the opinion that plaintiffs are not entitled to an award of damages, and for the reasons set forth in the Court's Supplemental Opinion of May 24, 1971,

IT IS, on this 16th day of June, 1971, ORDERED, ADJUDGED and DECLARED that:

(a) The original 1965 pension plan violated the referred to statute.

(b) The exception contained in the early retirement provision of the revised pension plan of May 1, 1967, (Sec. 4 (2)) thereof violates the referred to statute, and the defendant will immediately cease and desist from discriminating between male and female employees as to pension and retirement benefits.

(c) Plaintiffs' application for further affirmative relief by way of damages is denied.

(d) A counsel fee of $7,500.00 is granted to plaintiffs' attorney, George Duggan, Esq., without costs.

REYNIER J. WORTENDYKE, JR.
U.S.D.J.

Consent is hereby given to the form of the foregoing Order for Judgment.

GEORGE DUGGAN,
Attorney for Plaintiffs.

Opinion of the United States Court of Appeals for the Third Circuit

(Filed—April 1, 1969)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17286

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Appellants,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 19, 1968

Before SEITZ, ALDISERT and STAHL, *Circuit Judges*

Opinion of the United States Court of Appeals for the Third Circuit

OPINION OF THE COURT

STAHL, *Circuit Judge*

This appeal is from an order of the district court granting appellee's motion for summary judgment on the ground that the court lacked jurisdiction over appellants' suit which had been brought under the portion of Title VII of the Civil Rights Act of 1964 prohibiting discrimination on account of sex.[1]

The basis for granting the motion was twofold. First, the court was of the opinion that because the alleged unfair employment practice, discrimination in pension rights on the basis of sex, had been rectified by a collective bargaining agreement negotiated subsequent to proceedings before the Equal Employment Opportunity Commission (EEOC) and the filing of the suit, the issues raised by the complaint had become moot. Secondly, in dealing with an amendment to the appellants' complaint, which alleged that the appellee-company was still discriminating on account of sex in the pension arrangement under the new collective bargaining agreement, the court concluded that because the latter contention had never been the subject matter of a charge filed with the EEOC,[2] the court lacked jurisdiction.[3]

[1] Section 703(a)(1), 42 USCA §2000e-2.

[2] As will appear later, a charge against the revised pension plan had in fact been filed with the EEOC, but had not been called to the attention of the court prior to its decision. However, authority to file suit on this later charge had not been officially granted by the EEOC prior to the date of the amendment of the complaint or the lower court's decision. See note 15, *infra*.

[3] Section 706(e), 42 USCA § 2000e-5(e). For the conditions precedent to the filing of a civil action, see note 11, *infra*.

The appellants, Rosen, Sweeney and Utility Co-Workers Association, a certified bargaining representative for about 1,800 of the 15,000 employees of appellee, Public Service Electric and Gas Company, filed charges in 1965[4] with the EEOC alleging that appellee was committing an unlawful employment practice within the meaning of Title VII of the Civil Rights Act of 1964 by maintaining a pension plan that discriminated on the basis of sex because it permitted retirement at different ages and length of service for men and women.[5]

Under the pension plan male employees could retire at 65 with 25 years of service, with mandatory retirement at age 70. Female employees could retire at age 60 with 20 years' service and retirement was mandatory at age 65. The plan also provided for early retirement for male employees at the age of 60, but before attaining the age of 65,

---

[4] After the initial court suit was instituted in 1966 about 35 other employees filed charges with the EEOC. The additional charges were consolidated by the Commission with those filed in 1965. Appendix (App.) 80a-85a.

[5] Discrimination was also claimed in a job assignment provision of the collective bargaining agreement between the parties which provided that,

> If a male employee who is 60 years of age or over, or a female employee who is 55 years of age or over, is assigned to a lower classification not for incapacity, but because of the elimination of his [sic] job, his existing rate shall not be lowered by virtue of the assignment to a lower-rated job.

This provision was eliminated in the May 1, 1967 revision of the collective bargaining agreement, App. 60a, and appears to be no longer in issue.

upon completion of 30 years of service. Male employees taking early retirement had their pension benefits reduced by a specified rate.[6]

---

[6] The relevant sections of the pension plan (established in 1911 according to appellee and in effect up to the time of the May 1, 1967 revision), which formed the basis of the initial complaint, were as follows:

Section 3. Each male employee may at his option retire at age sixty-five or thereafter upon completion of twenty-five years of service, and must retire at age seventy. Each female employee may at her option retire at age sixty or thereafter upon completion of twenty years of service, and must retire at age sixty-five.

Section 4. Each employee who retires under the provisions of this Pension Plan relating to normal retirement for age shall be paid for life, in monthly installments, a pension computed at the annual rate of 1% of the average annual wage or salary of such employee for the five years of highest earnings within the last ten years of the employee's service, multiplied by the number of years, and any fraction of a year, of the employee's service.

Section 5. Each male employee may at his option retire at age sixty or thereafter but before attainment of age sixty-five upon completion of thirty years of service.

Section 6. Each male employee who retires under the provisions of this Pension Plan relating to early retirement shall be paid for life, in monthly installments, a pension computed at the annual rate of 1% of the average annual wage or salary of such employee for the five years of highest earnings within the last ten years of the employee's service, multiplied by the number of years, and any fraction of a year, of the employee's service, [and reduced by one-half of 1% for each month that such employee is less than age sixty-five at the time of his retirement.] (App. 2a.)

(Footnote continued on following page)

Opinion of the United States Court of Appeals for the Third Circuit

According to appellants, a male employee taking early retirement at age 60, after 30 years' service, would receive a substantially lower pension than a female employee retiring at the same age, with the same length of service, assuming the same average annual salary.[7]

After the charges were filed with the EEOC, and following an investigation, the Commission issued a decision, dated January 26, 1966, finding reasonable cause to believe that the pension plan violated Title VII.[8] By letter

---

(Footnote continued from preceding page)

The bracketed portion of Section 6 was modified prior to the filing of the initial suit to provide that,

> An employee who becomes eligible for early retirement under the present early retirement provisions of the Pension Plan and is sixty-two years old but less than age sixty-five will have his pension reduced by one-quarter of 1% for each month that he is less than age sixty-five at the time of retirement. The present reduction is one-half of 1% per month for this span of years.
>
> An employee eligible for early retirement under present provisions who is sixty years old but less than age sixty-two will have his pension reduced by one-quarter of 1% for each of the thirty-six months below age sixty-five and one-half of 1% for each month that he is below age sixty-two at the time of retirement. (App. 56a.)

[7] Appellants' brief, p. 3.

[8] App. 13a. While the discrimination found was generally against male employees, the Commission also said that,

> Female employees are disadvantaged by the discriminatory operation of the pension plan in that it is compulsory that they

(Footnote continued on following page)

Opinion of the United States Court of Appeals for the Third Circuit

dated February 9, 1966, the Director of Combliance of the EEOC informed appellant Rosen that such reasonable cause had been found, and that the Commission would attempt to eliminate the practice by conciliation.[9] By another letter, also dated February 9, 1966, Mr. Rosen was advised by the Director of Compliance that due to the heavy workload of the Commission, it had not been possible to undertake or to conclude the conciliation efforts, but that conciliation would be undertaken and continued.[10]

Mr. Rosen was further notified that under Section 706 (e) of Title VII of the Civil Rights Act of 1964, he had the right to bring suit in the district court within thirty days after the receipt of the letter. Suit was instituted on March 9, 1966, with Rosen, Sweeney and the union named as plaintiffs.[11]

(Footnote continued from preceding page)

> retire at age 65 even though some female employees who may be able and physically desirous of working five additional years would not be permitted to do so, . . .

It should be noted that appellant-union represents both male and female employees.

[9] App. 11.

[10] App. 12a.

[11] There is conflicting evidence in the record as to whether conciliation efforts had been undertaken before the EEOC's letter authorizing suit was sent and before and after suit was filed. (App. 49a, 50a, 69a, 71a, 76a-79a.) In view of recent decisions in a number of cir-

(Footnote continued on following page)

(Footnote continued from preceding page)

cuits, it appears that, at least as of the time this suit was initially brought, actual efforts at conciliation by the EEOC were not a prerequisite to the filing of a civil action under Title VII so long as a charge had been filed with the Commission and the statutory notice had been received from the EEOC that it had been unable to obtain voluntary compliance. Dent v. St. Louis-San Francisco Railway Company — F. 2d — (5th Cir. 1969); Johnson v. Seaboard Air Line Railroad Company and Charles E. Walker v. Pilot Freight Carriers, Inc., — F. 2d — (4th Cir. 1968), *pet. for cert. filed.* 37 U.S.L.W. 3285 (Feb. 4, 1969) (No. 981); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968), a case involving alleged discrimination in hiring on account of sex.

It should be added that on November 4, 1966, the EEOC issued the following regulation:

> § 1601.25a Processing of cases; when notice issues under § 1601.25.
>
> (a) The time for processing all cases is extended to 60 days except insofar as proceedings may be earlier terminated pursuant to § 1601.19.
>
> (b) Notwithstanding the provisions of paragraph (a) of this section, the Commission shall not issue a notice pursuant to § 1601.19 or, where a reasonable cause has been found, prior to efforts at conciliation with respondent, except that the charging party or the respondent may upon the expiration of 60 days after the filing of the charge or any time thereafter demand in writing that such notice issue, and the Commission shall promptly issue such notice to all parties.
>
> (c) Issuance of notice pursuant to § 1601.25 does not terminate the Commission's jurisdiction of the proceeding, and the case shall continue to be processed. 29 CFR 1601.25a.

(Footnote continued on following page)

During the pendency of the suit, the union and the appellee-company negotiated a new collective bargaining agreement effective May 1, 1967, which, *inter alia, modified* the pension plan by erasing the differences in the optional and mandatory retirement ages for men and women, thus apparently eliminating the predicate of appellants' initial complaint. All employees were permitted to retire at 65, with compulsory retirement at 70.

The modified pension plan also provided for early retirement for all employees at age 60, on a reduced pension, after 20 years of service. Female employees electing early retirement would not suffer any reduction in benefits on account of service prior to May 1, 1967.[12] No similar

(Footnote continued from preceding page)

Whether this regulation can be construed in the context of Title VII to require actual conciliation efforts as a condition precedent to a court action, we need not decide. As was the case with the initial complaint here, the *Dent, Johnson* and *Choate* cases all involved suits brought prior to November 1966. In *Dent*, the court said:

> It may be that this [November 4, 1966] regulation will generally put an end to cases in the posture of that here decided. — F.2d at —.

[12] In explanation of this provision, appellee stated in its brief, p. 9, that this

> . . . does no more than allow a credit to female employees for their years of service prior to the date of the revision, May 1, 1967, because the minimum retirement age for women alone was raised by negotiations from 60 to 65 years of age. As of May 1, 1967, no credit is allowed to female employees for service rendered after the date of the revision. Since the

(Footnote continued on following page)

provision was made for male employees electing early retirement.[13]

Following the adoption of the new collective bargaining agreement, the district court, on December 21, 1967, orally granted leave to appellants at pretrial conference

---

(Footnote continued from preceding page)

> minimum retirement age for male employees was not raised, the prior service credit for women was nothing other than a recognition by the defendant and the Union of an accrued contractual right for pension purposes, particularly in light of Article XVII of the labor agreement . . .

which prohibits the company from "diminish[ing] any of the benefits provided under said [pension] plan, . . ."

[13] According to appellants, this provision was also discriminatory in the following fashion:

> Thus, a female with thirty years' service, with an average salary of $10,000 per year, had pension credits of $3,000 per year, on May 1, 1967. If she retired on May 1, 1968, at age 60, she would have had an additional one year's service or an additional $100 credit. The $100 would be reduced by ¼ of 1% for twelve months, or a total of 3%, or $3, for a net of $97. Her pension would therefore be $3,097 per year, as of May 1, 1968.
>
> On the other hand a male employee, who retired on May 1, 1968, under exactly the same circumstances, would receive an annual pension of $3,100 less 21%, or $651, for a net pension of $2,449. (Appellants' brief, p. 5.)

Putting it another way, appellants contended that:

> In 1968, a female may retire at age 60, on a pension reduced by approximately .01% [this should probably be .1%]; a male's pension is reduced by 21%. (Brief, p. 15.)

"to file an amended" complaint to allege that the modified pension plan also violated Title VII ofthe Act. (App. 64a).

While we cannot find in the record that an amendment to the original complaint, or an amended complaint, was actually filed, the parties and the court proceeded in the action further as if amendment had been accomplished. For example, in its motion for summary judgment, appellee lists as one of its grounds:

> 3. The *revised* negotiated Pension Plan does not discriminate within the purview of Title VII of the Civil Rights Act of 1964. (Emphasis added). (App. 68a).

Likewise, in its briefs to this court, appellee refers to the "oral amendment" of the complaint at the pretrial conference. (Main brief, p. 2; reply brief, p. 2.).

In the oral opinion rendered by the court below, the judge stated:

> I consider that I am without jurisdiction at this particular time to grant the relief sought by way of *the amendments to the pleadings* set forth in the pretrial order [sic]. (Emphasis added). (App. 110a).

Thus in our disposition of this appeal we will treat the complaint as if an amendment had been filed.

On March 19, 1968, the district court granted appellee's motion for summary judgment.[14] The court was of the opinion that the modification of the pension plan

---

[14] App. 114a, 115a.

rendered the original complaint moot. Summary judgment was granted as to the amendment to the complaint on the ground that no charges had been filed with the EEOC alleging that the modified pension plan constituted an unfair employment practice;[15] hence, the administrative remedies under the 1964 Act had not been exhausted.[16]

On this appeal the appellants and the EEOC, appearing as amicus curiae, contend that the original complaint was not mooted by the May 1, 1967, revision in the pension plan because of the possibility that some employees may have suffered money damages before the change was made, and because the district court had failed to

---

[15] For reasons which are not entirely clear, the court below was not apprised by appellants that they had already filed further charges with the EEOC challenging the amended pension plan, and evidently appellee was also unaware of it at this time. The new charge had actually been filed sometime in July or August, *1967*. On August 22, *1968*, in accord with appellants' request (see EEOC brief, p. 3), the Commission notified appellants, pursuant to 29 C.F.R. § 1601.25 (b), that they had thirty days in which to institute suit.

On September 20, 1968, appellants filed a separate complaint in the district court, at Civil Docket No. 955—1968, alleging that the modified pension plan violated Title VII of the Act by discriminating on the basis of sex. That suit is still pending. According to this new complaint, a copy of which was supplied to this court, the EEOC has informed the parties that its investigation of the new charge would be "suspended" pending the decision of this court in the instant appeal.

[16] In their brief, p. 11, appellants argue strenuously that "it is not necessary . . . to file new charges [with the EEOC] because subsequest pension plan modifications do not correct the fault which is the basis for the original charge."

determine whether injunctive relief was necessary to protect the public interest against the alleged continuing discrimination by appellee on the basis of sex. The EEOC argues that the policy expressed in Title VII will be frustrated if parties-defendant in a Title VII proceeding are permitted "to place plaintiffs on an administrative treadmill by compelling litigants to go back to the Commission every time there is an alleged change in a discriminatory practice."[17]

We find merit in the first part of appellants' argument, i.e., the possibility of some of the employees of the appellee-company having suffered harm before the May 1, 1967 pension plan modification. *See* Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968).[18] Accordingly, insofar as the original complaint is concerned, the case will be remanded for a determination as to whether any of the named appellants, and any other male members of

---

[17] From EEOC's brief, p. 7.

The collective bargaining agreement evidently allows the appellee-company to make unilateral changes in the pension plan so long as such changes do not decrease the available benefits. The Commission and appellants envisage the possibility of the company making step-by-step decreases in any alleged inequality between male and female employees each time suit is brought, following the filing of charges with the Commission and the Commission's inability to obtain voluntary compliance. Appellee-company rejects this analysis of the collective bargaining agreement. (Appellee's reply brief, p. 8.)

[18] We rely on *Jenkins* only in support of the right to claim monetary damages for harm prior to the elimination of the discriminatory practice. For the reasons subsequently given, we do not follow *Jenkins* as to its approval of injunctive relief.

the union,[19] may have retired between the date of the initial 1965 charges before the EEOC and the May 1, 1967 change, and thus may have been harmed by the alleged discrimination in the pension benefit formula.[20] Such a finding, of course, would require the court to rule on whether the

---

[19] Because, apreviously stated, a number of other members of the union filed charges of discrimination with the EEOC, which the Commission by agreement with appellee (App. 85a) consolidated with the prior charges for purposes of investigation, and because of the apparent right of the union to bring this action on behalf of its members, International Chemical Workers Union v. Planters Manufacturing Co., 259 F. Supp. 365 (N.D. Miss. 1966), we believe that the court may consider possible harm not only to the named appellants but also to other members of the union. In its decision of January 26, 1966, App. 13a, the EEOC said that the charge filed by the union was "on behalf of all male employees as the aggrieved parties." Also, at pretrial conference, counsel for appellants stated "that this involves really a class action that is representative of a tremendous number of people in the Public Service Company, all of whom are involved in this one particular pension plan." App. 65a.

It should be noted, however, that appellee asserted below that the "suit is not a proper class action," App. 68a, and that the union is not an aggrieved person under Title VII, App. 20a. We do not decide the issue conclusively at this time but leave it for the initial determination of the district court if the matter is raised. *Cf. Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968).

[20] The original complaint filed by appellants sufficiently contemplates possible monetary damages as the prayer in each of the three causes of action set forth is "for such other and further relief as may be deemed just and proper by the court." We recognize appellants did not press this point below as they denied the case was moot. This does not prevent consideration of damages on remand.

original pension plan, prior to its modification, violated Title VII ofthe Civil Rights Act of 1964.[21]

---

[21] Appellee contended below that Title VII of the Civil Rights Act of 1964 does not apply to retirement and pension plans.

In February, 1968, the EEOC issued a "Statement of Guidelines" on this subject:

> *Sec. 1604.31 Pension and Retirement Plans*
>
> (a) A difference in optional or compulsory retirement ages based on sex violates Title VII.
>
> (b) Other differences based on sex, such as differences in benefits for survivors, will be decided by the Commission by the issuance of Commission decisions in cases raising such issues Because the provisions of the Administrative Procedure Act (5 U.S.C. 1003) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date, are inapplicable to these interpretative rules they shall become effective immediately and shall be applicable with respect to charges presently before or hereafter filed with the Commission, except that Section 1604.31(a) will become effective July 1, 1968, with respect to charges hereafter filed with the Commission.

While entitled to due weight (*see* American Newspaper Publishers Ass'n. v. Alexander, — F. Supp. —, 37 U.S.L.W. 2292 (D.D.C. 1968), for a discussion of the effect of an EEOC "guideline"), the Commission's declaration is not dispositive of the question, and we have found no reported cases ruling directly on the issue. Appellants rely by analogy on Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), which held that the requirement in the National Labor Relations Act that employers bargain "in respect to rates of pay, wages, hours of employment or other conditions of employment" covers pension plans. (*See also* Fireboard Paper Products Corp. v. NLRB, 379 U.S. 203, 222

(Footnote continued on following page)

If the district court does not find any party entitled to the kind of relief above described for harm caused by alleged discrimination prior to the May 1, 1967 pension plan revision, then we agree with the appellee that the issues raised in the *original* complaint are moot. We recognize that the complaint specifically requested injunctive relief, and we have studied carefully the position of the EEOC that the strong policy behind the Civil Rights Act of 1964 would normally support the grant of an injunction to make certain that an employer who has voluntarily stopped discriminatory practices continues to hew to the proper course.

As the appellee points out, and as is implicit in the cases upon which the EEOC relies, *e.g.*, Jenkins v. United Gas Corp., *supra,* this kind of injunctive relief is particularly appropriate in the sensitive area of racial discrimination where the Commission and the courts should make sure that once the formal proceedings have ended the ugly face of bias does not reappear. But this is not such a case. We do not make the distinction on the basis that discrim-

---

(Footnote continued from preceding page)

(1964); Retail Clerks Union v. NLRB, 330 F.2d 210, 215 (D.C. Cir.), *cert. denied,* 379 U.S. 828 (1964); and Annot., 12 A.L.R.2d 265, 274 (1950).) Title VII, which prohibits discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment, . . ." 42 USCA § 2000e-2(a)(1), is asserted by appellants' counsel actually to be broader in coverage than the National Labor Relations Act language. (App. 96a.)

Cf. Gruenwald v. *Gardner,* 390 F.2d 591 (2d Cir 1968), unsuccessfully challenging inequalities in social security benefits based on sex, which did not, however, involve the Civil Rights Act of 1964.

ination on account of sex is any less reprehensible or any less protected than discrimination because of race. We make the distinction because here we have a written modification of a pension plan, embodied in a collective bargaining agreement, which excised the age differentials in retirement between men and women to which the original complaint was addressed. We conclude, therefore, that if no male employee was harmed by the pre-May 1967 pension plan, that should dispose of the original complaint and injunctive relief is unnecessary.[22]

Turning now to the amendment to the original complaint which alleged continuing discrimination under the modified pension plan, we have already noted that a second suit has been filed duplicating the charge that the modified plan violates Title VII. Because this second suit has not yet been disposed of, and because it deals with precisely the same substantive issues as the amendment to the original complaint, we deem it unnecessary to determine whether the grant of summary judgment as to that portion of the first complaint was in error.[23] It was suggested at oral argument that consolidation of the two actions, i.e.,

---

[22] In Independent News Co. v. Williams, 404 F.2d 758 (3d Cir. 1968), we upheld the denial of an injunction "against a practice which has already been stopped" where there was a "reasonable inference" the practice would not be resumed. 404 F.2d at 761. We believe similar disposition is warranted here with respect to the discrimination charged in the initial complaint which has now been eliminated.

[23] We also deem it unnecessary therefore to determine whether, as appellants contend, the discrimination alleged in the modified pension plan was in fact a partial continuation of the discriminatory scheme of the original pension plan.

the original complaint as amended and the second complaint, would be sought if this court directed a remand. We believe that this would be the proper procedure to follow and that upon such consolidation the issues involved in the initial complaint, the amendment thereto, and the second complaint, can be sifted out and disposition made of them.[24]

As a matter of form, one other issue must be dealt with. Appellee moved to dismiss the appeal, and argument on the motion was heard at the time of the hearing on the merits. The motion to dismiss the appeal is denied.

The judgment of the district court will be vacated and the case will be remanded for further proceedings consistent with this opinion.[25]

---

[24] In connection with the charge made in the amendment to the first complaint, and in the second complaint, that the modified pension plan violates Title VII of the Civil Rights Act of 1964, the question may again arise as to whether the proper administrative procedures have been followed to permit the court to decide the issues raised on the merits. While the appellee has statd it would not raise any "jurisdictional" objections to the second suit (appellee's reply brief, p. 3; appellee's brief on motion to dismiss appeal. p. 3), the district court has the right, of course, to raise the question of jurisdiction, in the broad sense of that term, *sua sponte*. In view of the fact that appellants have filed a charge with the EEOC against the *modified* pension plan, and the EEOC *pursuant to appellants' request* has authorized the institution of a civil suit on this charge, *supra* note 15, the necessary prerequisites for court action appear to have been met according to the authorities cited in note 11, *supra*.

[25] We do not dispute the "public policy overtones" in this case stressed in the dissent. The applicability of Title VII to pension

(Footnote continued on following page)

SEITZ, *Circuit Judge*, dissenting.

The original complaint filed in this action on March 9, 1966, was based on Title VII of the Civil Rights Act of 1964. It explicitly sought declaratory and injunctive relief with respect to the defendant's then pension plan. The gravamen of the complaint was that the plan violated the Act because it discriminated in several respects in favor of female employees and in others, in favor of male employees. After the action was commenced, the defendant company revised the plan. Thereafter the plaintiffs amended their complaint[1] to challenge the plan as revised and to assert a class action. Still later defendant filed a motion for summary judgment on several grounds. In amending their complaint plaintiffs made it clear that

---

(Footnote continued from preceding page)

plans, particularly as related to the prohibition against discrimination on account of sex, will no doubt have to be determined in the second suit pending between the parties even if the original complaint is found to be moot. Furthermore, if appellants prevail in the second suit, there may emerge a pattern of discrimination which could conceivably call for injunctive relief.

All we decide today is that on the record in this appeal the powerful remedy of injunction is not warranted to provide protection from the discriminatory practice, alleged in the original complaint, which has already been eliminated. With respect to the second suit and the amendment to the first complaint, which should no doubt be consolidated for trial, we believe (without completely foreclosing the matter) that the issues are ripe for disposal on the merits. *See* note 24 *supra*.

[1] I agree with the majority's decision to treat the complaint as if an amendment had been filed.

they were not withdrawing the original complaint, even though they conceded that the bulk of the specific grievances alleged may have been rectified by the adoption of the revised plan.

The district court granted defendant's motion for summary judgment. Apparently the district court believed that the subject matter of the original complaint had been rendered moot by the revision of the pension plan and that only the amended complaint was before it. The amended complaint was dismissed on the ground that the court did not have jurisdiction over its subject matter, because plaintiffs had not complied with the procedural requirements of the Act by first requesting relief from the EECO.

As I understand the majority opinion, the court is remanding the subject matter of the original complaint to the district court to have it determined if there are any employees, apparently treated as a class, who were injured by the alleged violation of the Act in the period prior to the modification of the plan. If they cannot, then presumably, under the majority decision, the district court properly viewed the original complaint as moot. If they can, then the majority would direct the district court to decide whether plaintiffs have otherwise stated a legally cognizable claim. Although I agree with the majority that there should be a remand, I think their remand is too restrictive.

By their original complaint the plaintiffs sought, inter alia, a declaratory judgment that the plan violated the Act. The defendant raised many defenses, including the contention that Title VII of the Act did not apply to pension retirement plans. I think plaintiffs were entitled to have a declaration as to whether Title VII was applicable

to the plan, and if so, whether the plan violated the Act. The revision of the plan did not render these important issues moot; the parties were still very much concerned with their resolution. Indeed, the issue of the applicability of Title VII was reasserted by the defendant after the plaintiffs amended the complaint. Moreover, it was a particularly appropriate subject for a declaratory judgment in view of the public policy overtones involved.[2]

Plaintiffs also sought injunctive relief. Were the district court to decide that Title VII applies to pension plans and that the revised plan was in violation of the Act then the court would be obliged to consider the need for an injunction. Contrary to the majority's approach, I think that it is premature to consider the propriety of injunctive relief in view of the fact that the question was not presented or decided below, and because the basis for such a determination has not been developed

I next consider the dismissal of the amendment to the complaint by the district court on the ground that plaintiffs had not exhausted their remedies before the Commission as was said to be required by the Act. 42 U.S.C.A. § 2000e-5(e). The majority decided that this issue need not be resolved. I am forced to disagree.

Preliminarily, although the district court posed the issue in terms of its jurisdiction, it had jurisdiction and the issue is whether the statutory prerequisite had been satisfied.

---

[2] Compare Wirtz v. Glass Bottle Blowers, 389 U. S. 463 (1968).

Opinion of the United States Court of Appeals for the Third Circuit

Considering the discrimination charged in the amendment with that in the original complaint,[3] I conclude that the subject matter is so interrelated that the Act does not require plaintiffs to again petition the Commission in order that the district court might properly consider the amendment. A purpose for first proceeding before the Commission in this type of case is to permit an amicable settlement without litigation. When grievances are obviously independent that statutory purpose is best served by first resorting to conciliation before the EEOC. However, and as the EEOC urges, where, as here, the basic grievance had been "processed" by the Commission and litigation recommended, no statutory purpose is served by forcing further conciliation efforts. I therefore believe that it was error to grant summary judgment on the ground relied upon by the district court.

Clerk of the United States Court of Appeals for the Third Circuit.

---

[3] In substance both the original and the amended complaints charge unlawful discrimination because women employees, when electing early retirement are treated more favorably than their male counterparts.

Letter dated February 9, 1966 from Director of Compliance to Mr. Leo Rosen (Exhibit 3)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

February 9, 1966

In Reply Refer to
File No. 5-9-673
Respondent:
Public Service Electric & Gas Company
Newark, New Jersey

Mr. Leo Rosen
104 LaGrande Avenue
Fanwood, New Jersey

Dear Mr. Rosen:

Due to the heavy workload of the Commission, it has been impossible to undertake or to conclude conciliation efforts in the above matter as of this date. However, the conciliation activities of the Commission will be undertaken and continued.

Under the provisions of Section 706(e) of Title VII of the Civil Rights Act of 1964, the Commission must notify you of your right to bring an action in Federal District Court within a limited time after the filing of a complaint.

This is to advise you that you may within thirty days of the receipt of this letter, institute a civil action in the appropriate Federal District Court. If you are unable to retain an attorney, the Federal Court is authorized in its discretion, to appoint an attorney to represent you and to authorize the commencement of the suit without

Letter dated February 9, 1966 from Director of Compliance to Mr. Leon Rosen (Exhibit 3)

payment of fees, costs or security. If you decide to institute suit and find you need such assistance, you may take this letter, along with the enclosed Commission determination of reasonable cause to believe Title VII has been violated, to the Clerk of the Federal District Court nearest to the piace where the alleged discrimination occurred, and to request that a Federal District Judge appoint counsel to represent you.

Please feel free to contact the Commission if you have any questions about this matter.

Very truly yours,

GEORGE L. HOLLAND
Director of Compliance

Enclosure

Decision of Commissioner Jackson (Exhibit 4)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506
Case No. 5-9-673
Charging Parties

LEO ROSEN, et. al.

vs.

PUBLIC SERVICE ELECTRIC & GAS COMPANY
Newark, New Jersey
Respondent

Date of alleged violation: Continuing

Date of filing: November 15, 1965

Date of service of charge: November 15, 1965

COMMISSIONER DECISION

SUMMARY OF CHARGES

The charging party, Leo Rosen, is an employee of the respondent and filed the charge in his own behalf. Morgan Sweeney filed a charge with the same allegations as an individual and as President of the Utility Co-Workers Association, the local Union that represents the respond-

ent's employees. A charge was also filed by the Utility Co-Workers Association on behalf of all male employees as the aggrieved parties. All charges raise the issue of discriminatory practices on the basis of sex relating to a pension plan maintained by the respondent which differentiates between male and female employees as to eligibility based on age and length of service.

In addition, the charge of Leo Rosen alleges discrimination based on sex in that the employer permits female employees who are reassigned in new jobs as a result of incapacity or job elimination to retain their existing rate of pay at age 55 or greater while male employees must be 60 years old or greater to retain their existing rate of pay.

SUMMARY OF INVESTIGATION

There is evidence to support the allegation that the pension plan maintained by the employer discriminates on the basis of sex between the male and female employees.

1. Male employees may retire at age 65 and must retire at age 70.
2. Female employees may retire at age 60 and must retire at age 65.
3. Male employees may retire at age 60 with 30 years service at a reduced pension, or male employees may retire with full pension benefits at age 65 with 25 years of service; whereas, female employees may retire with full pension benefits at age 60 with only 20 years of service.

4. Male employees are disadvantaged because of the discriminatory pension plan in that they must have 25 years of service before they can retire with full pension benefits and then only at age 65 or greater, while female employees with only 20 years of service may retire at full pension benefits at age 60.
5. Female employees are disadvantaged by the discriminatory operation of the pension plan in that it is compulsory that they retire at age 65 even though some female employees who may be physically able and desirous of working five additional years would not be permitted to do so, while the mandatory retirement age for male employees is 70.

   There is also reason to believe that the respondent discriminates by providing different criteria for entitlement of reassignment rates for its male and and female employees.

   a. Female employees who are assigned to a lower job classification either because of incapacity or job elimination may retain their existing rate of pay if they are age 55 or greater.

   b. Male employees who are assigned to a lower job classification either because of incapacity or job elimination may retain their existing rate of pay only if they are age 60 or greater. Thus male employees are disadvantaged by this provision of the Labor Management Agreement.

DECISION

Reasonable cause exists to believe that the respondent is in violation of Section 703(b) of Title VII against the

Decision of Commissioner Jackson (Exhibit 4)

charging parties in the operation of its pension plan and in the differentials in rate of pay upon reassignment to lower job classifications.

January 26, 1966

Approved by Commission:

SAMUEL C. JACKSON
Commissioner

Date

Opinion of the United States Court of Appeals for the Fourth Circuit

(Filed—June 10, 1976)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-2171

VINCENT R. CHASTANG,

Appellee,

v.

FLYNN AND EMRICH COMPANY, CHARLES T. TURNER, JAMES F. TURNER, III, JAMES F. TURNER, JR., and their successors, constituting the FLYNN AND EMRICH COMPANY, PROFIT SHARING TRUST COMMITTEE,

Appellants,

THE EQUITABLE TRUST COMPANY,

Defendant.

Opinion of the United States Court of Appeals for the Fourth Circuit

No. 74-2172

VINCENT R. CHASTANG,

Appellant,

v.

FLYNN AND EMRICH COMPANY and THE EQUITABLE TRUST COMPANY, and CHARLES T. TURNER, JAMES F. TURNER, III, JAMES F. TURNER, JR., and their successors, constituting the FLYNN AND EMRICH COMPANY, PROFIT SHARING TRUST COMMITTEE,

Appellees.

No. 74-2173

FRANK UGIANSKY,

Appellee,

v.

FLYNN AND EMRICH COMPANY, and CHARLES T. TURNER, JAMES F. TURNER, III, and JAMES F. TURNER, JR., and their successors, constituting the FLYNN AND EMRICH COMPANY, PROFIT SHARING TRUST COMMITTEE,

Appellants,

THE EQUITABLE TRUST COMPANY,

Defendant.

Opinion of the United States Court of Appeals for the Fourth Circuit

No. 74-2174

FRANK UGIANSKY,

Appellant,

v.

FLYNN AND EMRICH COMPANY, and THE EQUITABLE TRUST COMPANY, CHARLES T. TURNER, JAMES F. TURNER, III, and JAMES F. TURNER, JR., and their successors, constituting the FLYNN AND EMRICH COMPANY, PROFIT SHARING TRUST COMMITTEE,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore, James R. Miller, Jr., District Judge.

Argued February 3, 1976 Decided JUN 10 1976

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WINTER, Circuit Judge.

WINTER, Circuit Judge:

Alleging that a profit sharing and retirement plan which provided differing benefits to male and female participants illegally discriminated on the basis of sex, Vincent R. Chastang and Frank Ugiansky brought suit against their employer, Flynn & Emrich Company (Company) the individuals comprising the members of the Profit Sharing Trust Committee (the Committee), and the corporate trustee under the plan, The Equitable Trust Company (Equitable). The district court found that the plan illegally discriminated against male employees. It awarded to plaintiffs as damages the difference between the amount of benefits they received and those that would be paid to similarly situated females; it dismissed Equitable from the suit; and it declined to award plaintiffs attorneys' fees. Plaintiffs, the Company and the individual defendants have appealed. We affirm except with respect to the dismissal of Equitable.

I.

In December, 1943, the Company established a non-contributory retirement plan for salaried employees. It executed an "Employees' Profit Sharing and Retirement Trust Agreement" (the plan) under which the Company makes contributions of a portion of its profits, if any, into a fund from which payments are made to salaried employees upon their retirement. The fund is administered by the Committee, which is and has been comprised primarily of officers and/or directors of the Company. Equitable acts as corporate trustee for the plan. The duties of the trustee are confined to record keeping, in-

vesting funds and paying out benefits in accordance with instructions given it by the Committee.

While the plan permits early retirement for male and female employees, males, prior to 1970, faced greater obstacles than females in qualifying for full benefits in the event they elected early retirement. The obstacles were derived from the provisions of the plan as to when an employee's interest in the fund became vested or non-forfeitable.[1] Beginning at the end of her second year of employment, 10% of a woman's proportionate share of the fund established by the plan would become non-forfeitable for each year of her employment. Thus, at the end of eleven years, 100% of her proportionate interest in the fund would have become non-forfeitable, and she would receive full benefits if she retired at any time thereafter. By contrast, only 5% of a man's proportionate interest in the fund would become non-forfeitable for each year of employment after the first two years. Further, after a man had accumulated a 50% non-forfeitable interest in his proportionate share of the fund, the percentage would generally not increase unless he worked until age 65,[2] at which time a male employee became entitled to full benefits based upon a 100% non-forfeitable interest.

---

[1] In 1970, an amendment was adopted which equalized the vesting provisions for men and women employees.

[2] A male employee would also receive full benefits based upon a 10% yearly proportionate accrual if the employee died or was totally incapacitated, entered the armed forces during time of war, or voluntarily or involuntarily was shifted from a salaried basis of compensation to an hourly or wage basis of compensation.

Chastang was employed by the Company in February, 1937, and retired effective July 25, 1968, at the age of 52. Ugiansky was employed by the Company in January, 1951, and retired effective March 24, 1969, at the age of 42.[3] Each man received only 50% of his proportionate share of the retirement fund. After filing complaints with the Equal Employment Opportunity Commission and receiving "right to sue" letters, each brought suit in district court alleging that the plan unfairly discriminated against male employees.

II.

It is well settled that retirement benefits are within the "compensation, terms, conditions, or privileges of employment" covered by § 703(a) of Title VII, 42 U.S.C. § 2000e-2(a). Rosen v. Republic Service Electric & Gas Co., 477 F.2d 90 (3 Cir. 1973); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7 Cir.), cert. denied, 404 U.S. 936 (1971). *See also* Gilbert v. General Electric Co., 519 F.2d 661, 663 (4 Cir.), cert. granted, —— U.S. —— (1975); Peters v. Missouri-Pacific R.R. Co., 483 F.2d 490 (5 Cir.), cert. denied, 414 U.S. 1002 (1973). These cases all proceed on the well established "business necessity" test established in Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971), and Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). *Martin Marietta* held that under Title VII, disparate treatment on the basis of sex is sustainable only if the employer can show that the disparity is required either by "business necessity" or by a *bona fide*

[3] Ugiansky was reemployed by the Company in 1971.

occupational qualification reasonably necessary to the normal operation of the business. Of course, in the instant case there is no claim that only women can perform the duties of the positions covered by the plan.

The Company and the individual defendants argue that the "business necessity" test is inapplicable to sexual, as distinguished from racial, discrimination where the difference in treatment of employees of different sexes is justified as a means of redressing the disparity between the economic and physical capabilities of men and women. They rely on cases such as Kahn v. Shevin, 416 U.S. 351 (1974), and Gruenwald v. Gardner, 390 F.2d 591 (2 Cir. 1968), which uphold the rights of the state and federal governments, respectively, to favor women in order to compensate for other disabilities which females face in American society.

We are not persuaded. *Martin Marietta* is certainly to the contrary with respect to qualifications for employment, and we see no basis on which to treat qualifications for employment differently from qualifications for retirement. Moreover, defendants' authorities did not deal with Title VII, but rather with the equal protection and due process clauses of the fourteenth and fifth amendments respectively. While these cases hold that these constitutional provisions require only that a rational basis be shown to justify discrimination between men and women,[4] Title VII, by contrast, precludes *all* discrimination on the

[4] Other cases, which we need not explore, hold or suggest that discrimination on the basis of sex is constitutionally permissible only if a more stringent test than the "rational basis" test is satisfied.

basis of sex unless justified by a compelling business reason. Gilbert v. General Electric Company, 519 F.2d at 667; Robinson v. Lorillard Corporation, 444 F.2d 791 (4 Cir.), cert. denied, 404 U.S. 1006 (1971). Furthermore, in the instant case, the Company has not established even a rational basis for the disparity in the retirement plan. The only justification put forth is that because of lack of physical strength women are unable to qualify for higher-paying Company jobs involving manual labor, and thus should be favored in the pension plan in order to compensate them for being relegated to lower-paying positions. But the plan at issue does not apply to manual laborers; it applies only to clerical and office workers. As the district court observed, "It is a *non sequitur* to justify a discriminatory practice . . . on the basis that male manual foundry workers earn more than female office workers when the males who are discriminated against under the retirement plan are not the manual foundry workers but the male supervisory and office personnel." Chastang v. Flynn & Emrich Co., 365 F.S. 957, 966 (D. Md. 1973). Since the disparity in benefits does not meet even a rational basis test, it must be held in violation of Title VII.

We find no other business necessity to justify the disparate treatment. The Company's concern to compensate women because they generally earn less than men is belied by its failure to extend benefits to female foundry workers, the lowest-paid of the female employees. The possible justification of discouraging early retirement by male employees—suggested and rejected by the district court—is not pressed on us on appeal.

III.

Each plaintiff was awarded damages equal to his total proportionate share of the retirement fund less the amount he actually received upon leaving the Company's employ. The Company and the individual defendants contend that this award is a forbidden retroactive application of Title VII. *See* Robinson v. Lorillard Corporation, 444 F.2d 791 (4 Cir.), cert. denied, 404 U.S. 1006 (1971). They argue that damages should be limited to those benefits which were earned subsequent to July 2, 1965—the effective date of the Civil Rights Act of 1964.

We recognize that Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3 Cir. 1973) on remand, 11 FEP Cases, 330 (D. N.J. 1974), aff'd without opinion, 527 F.2d 645 (1976), tends to support the position of the Company and the individual defendants; nonetheless, we agree with the district court.

Each year that plaintiffs worked for the Company, both prior and subsequent to the effective date of the Act, they received the same credit for their proportionate share of the fund as did female employees. In the fund's annual statements and its advice to each participant of his interest in the fund, plaintiffs were treated as having the proportionate interest in the fund to which they would be entitled if they retired at normal retirement age. The reduction of their interest occurred by invoking the forfeiture provisions which became effective upon their early retirement. It is true that authorization for forfeiture existed from December 31, 1942—the date on which the plan was established—but the possibility of forfeiture was inchoate and not effective until they elected early retire-

ment. Moreover, forfeiture was selective—males under certain conditions could receive full benefits upon early retirement—so that whether forfeiture was to be invoked could not be determined until the time of retirement. Plaintiffs' early retirement did not take place until after the effective date of the Act. Thus, we see no retroactive application of the Act.

It is significant also, when the plaintiffs were divested of one-half of their respective interests due to their early retirement, the fund in effect received a windfall which did not affect the rights of any former Company employees who retired prior to the effective date of Title VII. When a participant in the plan retires, his interest in the fund is segregated and separated; any windfalls which later accrue to the benefit of the fund have no effect on that segregated interest, they are simply divided ratably among the then remaining unretired participants in the plan.

We think that the district court was correct in holding that the 50% divestiture provision was a discriminatory penalty imposed upon the plaintiffs on the dates of their respective retirements, that the invalidation of the discrimination involved no retroactive application of the Act, and that the court was correct in awarding damages equal to the total value of the divestiture. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

IV.

We turn to plaintiffs' contention that the district court erred in dismissing Equitable as a defendant. We agree that there was error.

The district court dismissed Equitable because the latter "was little more than a nominal trustee," had "limited control over the administration of the fund," and was "a mere passive participant in the discrimination at the direction of the Trust Committee." While these findings may be correct, the Act makes no distinction between "active" and "passive" participants in acts of discrimination. Equitable was not a mere volunteer; it was a corporate trustee for compensation, and it continued to act as trustee even after the trust instrument became illegally discriminatory on its face. As corporate trustee for the plan, Equitable should be bound to carry out any conclusion reached by the court with respect to the plan's illegality. Thus, it was proper to join Equitable in this suit, and Equitable should have been retained as a party until a final decree was entered. Of course, because of Equitable's passive role in the illegal discrimination, it should not be held liable for the damages awarded to plaintiffs. It should, however, bear its share of plaintiffs' court costs, no part of which should be assessed against plaintiffs.

V.

Finally, plaintiffs challenge the refusal of the district court to award them reasonable attorneys' fees. *See* 42 U.S.C. § 2000e-5(k). While the award of such fees rests with the sound discretion of the district court, prevailing parties in Title VII actions should ordinarily be awarded attorneys' fees absent special circumstances would render such an award unjust. Albemarle Paper Co. v. Moody, supra; Robinson v. Lorillard Corporation, 444 F.2d at

804. We think that such circumstances exist here, so that it cannot be said that the district court abused its discretion.

Although the Company was the originator of the illegal discrimination, it originated it on December 31, 1942, when such discrimination was not illegal. Having established the plan, the Company did not retain an unrestricted right to amend the plan. It could accomplish an amendment only with the concurrence of a majority of the five members of the Committee named by the Company to administer it. Notwithstanding that the Act became effective on July 2, 1965, EEOC did not take the position that differences in optional or compulsory retirement ages based on sex violated Title VII until February 21, 1968. *See* 29 C.F.R. § 1604.31. Even so, on September 13, 1968, general counsel to EEOC gave an opinion that retirement plans in conflict with the Commission's guidelines because they discriminated on the basis of sex could be gradually adjusted to bring them into conformity with the guidelines and that the judgment of the parties as to a proper schedule for adjustment "would carry considerable weight."

Plaintiff Chastang retired July 25, 1968, and plaintiff Ugiansky retired March 24, 1969, but was later rehired even though he was then in litigation with the Company. The Company, with the concurrence of a majority of the Committee, caused the plan to be amended on December 8, 1970, to obviate the sex discrimination on which plaintiffs base their claim. Plaintiffs brought their suits on June 2, 1971, on their own behalf and not representing any class.

We have already stated that Equitable should not be held liable for damages although it should bear its share of plaintiffs' court costs; nor do we think that the Company should pay attorneys' fees. We cannot say that it failed to act with reasonable dispatch as soon as a murky area of the law was clarified. It redressed its unintentional violation of the Act, and from the chronology of events we cannot infer that plaintiffs' law suits were a contributing factor. Of course, the Company's good faith alone would not insulate it from making plaintiffs whole, Albemarle Paper Co. v. Moody, supra, but there is more here. It had no pecuniary interest in the fund it had established; it therefore had no economic incentive to violate the Act; and, more importantly, it had no right unilaterally to alter the schedule of benefits for participants in the plan before or after retirement.

Similarly, the Committee administering the plan had no right to change it unilaterally. It, too, proceeded with reasonable dispatch in amending the plan once the need for amendment was established. It, of course, did not act as employer, participants in the plan were not its employees, its only interest in the funds it administered was a fiduciary one—not one from which its members could draw any personal benefit, and it did not originate the discrimination which subsequently became illegal. At most, it participated in a passive act of discrimination which became illegal because of a change in the law.

Should attorneys' fees be awarded against the fund, the net effect would be to penalize innocent participants in the plan. They engaged in no discriminatory act, active or passive. Because the plan was amended to eliminate its illegally discriminatory aspects before plaintiffs' suits

were filed, they cannot be said to have derived any benefit, direct or indirect, from the litigation.

In short, in denying an award of counsel fees, the district court's finding of special circumstances to deny the award is supported factually, and we cannot say that the district court exceeded its discretion.

REVERSED IN PART;
AFFIRMED IN PART.
PLAINTIFFS TO RECOVER COSTS.

BRYAN, Senior Circuit Judge, dissenting:

The major difficulty I have with the majority opinion is its retroactive application of the Civil Rights Act to the pension plan's benefits for the years (the pre-Act years) before the statute became effective. I find no fault with the Act's vitiation of the forfeiture of benefits for the years after the Act (the post-Act years) was effective. The following sketch of appellee Chastang's participation is offered to illustrate the two periods:

SKETCH

(Opposite) ☛

Feb. 1937	:	Chastang employed
	:	
1943	:	Plan established
	:	22 yrs. of benefits before Act
July 2, 1965	:	Civil Rights Act effective
	:	3 yrs. of benefits after Act
July 25, 1968	:	Early retirement of Chastang and forfeiture at age 52
	:	
	:	
Mandatory retirement at age 65		

As the majority carefully explains, for every year of their employment after the first, each of the appellees in accordance with the plan were credited by the Company with a specified percentage of his interest in the retirement fund, which would be the share payable to him on the date fixed by the plan for his mandatory retirement. Earlier retirement was permitted all employees but a male employee retired under pain of forfeiture of one-half of the share in the fund then credited to him, that is, 50% of the total of the yearly contributions made by the Company to the fund for the credit of the employee. No such penalty was exacted of female employees and this is the asserted discrimination in suit.

Both appellees took advantage of early retirement; whereupon the Company paid each of them 50% of the total sum to his credit in the fund. This amount was half of the total of the employer's annual contributions for both of the two employment periods: (1) the years before the Act's effective date, July 2, 1965, and (2) the years running from that date to the day of early retirement. The majority now requires the Company to pay these employees the remaining 50% for both the pre- and post-Act years holding that the Act forbids the reduction on early retirement, terming it discrimination against the appellees on the basis of sex.

My disagreement is with so much of the decision as applies the Act to the pre-Act contributions. This legislation had no effect prior to July 2, 1965, Robinson v. Lorillard Corporation, 444 F2d 791 (4 Cir.), cert. denied 404 US 1006 (1976). Thus, of necessity it could not preclude the plan's reduction in the pre-Act years' entitle-

ments. The majority puts its ruling on this syllogism: the early retirement occurred post-July 2, it triggered the reduction, and so the reduction was effectuated post-July 2, and so not retroactively. This conclusion, even if accepted arguendo, responds to only a part of the question here; it wholly ignores the areas of impact of the forfeitures. No matter when activated, the forfeiture has provinces of effect. The essential inquiry is what was the scope of the reaction. The answer, obviously, is that the play of the forfeiture was on the pre-Act years as well as the post-Act years. The majority allows the Act to nullify the reduction in the pre-Act period and so adapts the law retrospectively.

The unreality of applying a post-Act early retirement forfeiture to pre-Act accrued benefits is revealed by a simple demonstration. Supposing the early retirement occurred one day after the effective date of the Act, July 3, 1965, it would strain reason to apply the forfeiture to the pre-Act accruals. Just as illogical is it when the forfeiture occurs three years, as here, after the inception of the Act. Retroactivity of the Act to pension plans has been twice denied by the Third Circuit: Rosen v. Public Service Electric & Gas Co., 477 F2d 90 (1973) and eo nomine, 527 F2d 645 (1976) with opinion unpublished.

As if significant, the majority observes that the 50% deduction upon early retirement resulted each time in a "windfall" to the fund. I fail to grasp how this circumstance argues the majority's position. The fact that the money reverted to the fund is no ground for disbursing it to early retirees. The windfalls do not enter the Company's coffers. It, not the employees, contributes all the

moneys comprising the trust, but the Company is not the beneficiary of the reversions. The fund is the recipient. The 50% cancellations of the credits may well give added strength to the fund against unforeseeable obligations. For these reasons I think, too, that no monetary judgment in this case would lie against the Company.

Finally, the plan's payments are in no aspect akin to the employment seniority rights which have been the subject of litigation under the Civil Rights Act. See, e.g., Franks, et al. v. Bowman Transportation Company, Inc., —— US —— (No. 74-728, March 24, 1976) and Robinson v. Lorillard Corporation, supra, 444 F2d 791 (4 Cir.) cert. denied 404 US 1006 (1976). There employees who were denied seniority post-Act were allowed to invoke proof of pre-Act discrimination practices to establish that post-Act denials were but a continuation of a prior pattern of discrimination. The pre-Act conduct was properly looked to as responsible for the loss of rightful claims of seniority. It included charges of unwarrantable suppression of rights, unfair classifications of standings as well as unjust treatment generally. There is, plainly, no likeness in these issues to those in this action. Here, no claimant's entitlement is shaped by antecedent circumstances.

I would vacate the order of the District Court insofar as it directs any of the defendants to pay the plaintiffs the 50% reduction of their benefits for the years preceding July 2, 1965.

Supreme Court, U. S.
FILED
JUL 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1908

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Petitioners,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

WILLIAM S. SMITH,
Counsel for Respondent,
90 Park Place,
Newark, New Jersey 07101.

HERMAN H. WILLE, JR.,
Of Counsel.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
JURISDICTION	1
COUNTER-STATEMENT OF QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
ARGUMENT—The decision of the United States Court of Appeals for the Third Circuit in these cases does not conflict with any decision of another Court of Appeals in the same matter and follows the well established cases of this Court on the subject matter involved	5
CONCLUSION	15

APPENDIX:

Opinion of the Supreme Court of the United States Re: Fitzpatrick v. Bitzer, 519 F.2d 559 C.C.A. 2d (1975); Aff. in part, rev. in part, —— U.S. ——, Sup. Ct. of U.S. (June 28, 1976)	1b
Pretrial Conference and Order in the United States District Court for the District of New Jersey	17b

Cases Cited

Albemarle Paper Company v. Moody, 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975)	13
Bowe v. Colgate-Palmolive Co., 416 F. 2d 711 (7th Cir. 1969)	7

PAGE

Chastang v. Flynn and Emrich Co., 337 F. Supp. 807 (D. Ct. Md. 1972); 365 F. Supp. 957 (D. Ct. Md. 1973); Aff. in part, rev. in part, —— F.2d —— (4th Cir., June 10, 1976) 10, 11

Dobbins v. Local 212, Int. Bro. of Electrical Workers, 292 F. Supp. 413, 445 (S. D. Ohio, 1968) 6

Fitzpatrick v. Bitzer, 519 F.2d 559 C.C.A. 2d (1975); Aff. in part, rev. in part, —— U.S. ——, Sup. Ct. of U.S. (June 28, 1976) 13

Hassett v. Welch, 303 U.S. 303 (1938) 5

Head v. Timken Roller Bearing Co., 486 F.2d 870 6th Cir. (1973) 8

Inland Steel Co. v. National Labor Relations Board, 170 F.2d 247 (7th Cir. 1948); cert. denied, 336 U.S. 960 (1949) 6, 9, 13

Local 189, United Paperworkers v. United States, 416 F.2d 980, 987 (5th Cir. 1969) cert. denied, 397 U.S. 919 (1970) 7

Meat Cutters, Local 340 v. Safeway Stores, Inc., 4 F.E.P. Cas. 510 (D. Kan. Feb. 4, 1972) 7

Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir.), cert. denied, 404 U.S. 1006 (1971) 11

Stopford v. Boonton Molding Co., 56 N.J. 169, 265 A.2d 657 (1970) 12, 13

United States of America v. The Sheet Metal Workers International Association, Local Union No. 36 AFL-CIO and the Local No. 1 of the International Brotherhood of Electrical Workers, AFL-CIO, 280 F. Supp. 719 (E. D. Mo. 1968) 6

PAGE

Statute Cited

42 U.S.C. 2000e-5(g) 8

Other Authorities Cited

Interpretive Memorandum of Title VII, Senators Clark and Case, 110 Cong. Rec. 7212 (1964) 6

National Labor Relations Board, Case No. F-611 (Administrative Decision of the General Council (9/11/58)) 7

Rutgers Law Review, Volume 26, Number 4, Page 760 (Summer 1973) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Petitioners,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Jurisdiction

The statement contained on Page 3 of the Plaintiff-Petitioners' Brief concerning the jurisdiction of this Court is correct.

Counter-Statement of Question Presented

Does the decision of the United States Court of Appeals for the Third Circuit in these cases, which was filed on March 8, 1973 and reported in 477 F.2d 90, also appearing in the Petitioners' Appendix on Page 13a, et seq., conflict with the decision of another Court of Appeals on the same matter?

Statutory Provisions Involved

The statement set forth in the Petitioners' Brief on Page 3 is correct.

Statement of the Case

This litigation started in 1966 and involved several hearings in the District Court and three appeals to the Third Circuit Court of Appeals before reaching its present stage. The litigation revolves around the Pension Plan of the Respondent which, at the time the Civil Rights Act of 1964 became effective, July 2, 1965, provided that male employees could retire at age 65 without reduction but could elect early retirement from ages 60 through 64 with a reduction in pension amount. Females were obliged to retire at age 65, but could also retire at age 60 without reduction. In 1967, effective May 1, the Pension Plan was amended to provide the same retirement provisions for males and females with respect to current service, that is, the same reduction percentages applicable to females who retired early at ages 60 through 64 as applied to the males retiring at the same ages. There was, however, a saving feature in the Plan which provided that with respect to pension credits on account of service prior to

May 1, 1967, there would be no reduction in early retirement pensions for women; the Plan provided for continuing reduction in early retirement pensions for the males concerning pension credits on account of time worked prior to May 1, 1967.

The various stages of litigation resulted in a determination that both Pension Plans were violative of the Civil Rights Act, in that the Plans discriminated against males in favor of females in the pension benefits payable for early retirement under certain circumstances. The third Circuit Court of Appeals so held in its decision filed March 8, 1973 and reported at 477 F.2d 90 (13a). None of the parties to this suit took an appeal from this portion of the decision of the Third Circuit Court, and the case was remanded to the District Court for the determination of damages.

On remand, the cases were pre-tried before the trial judge and it was agreed that there were no factual issues to be determined by the trial court (19b) and that the question before the court was one of pure law (19b).

The trial court, following the language of the Third Circuit, found the proper measure of damages to be as follows:

> "Defendant asserts that this language requires this Court to limit the damage award to the differential benefits received by male and female employees for services performed between July 2, 1965 and May 1, 1967. In other words, men who have retired since July 2, 1965 would receive increased benefits henceforth only with regard to pension rights they accrued for work performed during that 22-month period, and would receive no increase in

> benefits for work performed before the effective date of the Act. • • • It is the conclusion of this Court that it is bound by the language of the Court of Appeals, and must therefore embrace defendant's theory of the damage calculation period" (35a et seq.).

An Order for Judgment was agreed upon containing the finding of the Court, including a formula for determination of the damages and a listing of the Union members showing the accumulated damages through December 31, 1974, together with the monthly amounts to be added to future pension payments as a result of the Court's ruling (39a through 46a).

Basically, the net effect of the prior litigation has been to roll back the Company's equalization of early retirement pensions with respect to future service from credits after May 1, 1967 to credits after July 2, 1965, the effective date of the Civil Rights Act. The differences in the early retirement benefits of men and women on account of credits for service rendered and work performed prior to July 2, 1965, the effective date of Title VII, were maintained. The Petitioners are endeavoring, in their Petition regarding discrimination based upon sex, to make the provisions of Title VII retroactive and to cover pension credits earned by males for service prior to the effective date of the Act. As pointed out in the Argument portion of this Brief, Respondent respectfully submits that retroactive application of the Civil Rights Act is improper under the Law.

REASONS FOR DENYING THE WRIT

ARGUMENT

The decision of the United States Court of Appeals for the Third Circuit in these cases does not conflict with any decision of another Court of Appeals in the same matter and follows the well established cases of this Court on the subject matter involved.

The Petitioners would apply the Civil Rights Act retrospectively to pension credits earned on account of service prior to July 2, 1965, the effective date of the Act.

The Third Circuit Court of Appeals, in the language of its opinion, indicated quite clearly that damages were assessable "on account of service prior to May 1, 1967, the effective date of the revised retirement plan, and after the effective date of the Act" (25a), or in other words, for pension credits earned during the 22-month period following the effective date of the Act.

This ruling, of course, was in accordance with legal doctrine.

On and after July 2, 1965, the effective date of the Civil Rights Act of 1964, discriminatory employment practices were prohibited. Since the provisions of the Act were not specifically made retroactive, it is clear that discriminatory practices which occurred prior to July 2, 1965 cannot constitute a violation of the Act.

Indeed the principle is well established that statutes are held to be prospective in application unless Congress specifically indicates otherwise. *Hassett* v. *Welch*, 303 U.S. 303 (1938).

In this regard in their Interpretive Memorandum of Title VII, Senators Clark and Case, two of the leading supporters of the Act, said of the Title, "Its effect is prospective and not retrospective," and "The principal purpose of the Commission (Equal Employment Opportunity Commission) pressing complaints is to obtain future compliance" *Interpretive Memorandum of Title VII, Senators Clark and Case* 110 Cong. Rec. 7212 (1964). The principle that the Civil Rights Act of 1964 is to be given prospective application only has been recognized in a number of significant instances. In *United States of America* v. *The Sheet Metal Workers International Association, Local Union No. 36 AFL-CIO, and the Local No. 1 of the International Brotherhood of Electrical Workers, AFL-CIO,* 280 F. Supp. 719 (E. D. Mo. 1968), the Court stated:

> "Such a pattern or practice must be shown to have existed after July 2, 1965, i.e., after the effective date of the Act, because discriminatory actions and conduct which occurred prior to that date cannot constitute a violation of the Act."

Further in *Dobbins* v. *Local 212, Int. Bro. of Electrical Workers,* 292 F. Supp. 413, 445 (S.D. Ohio, 1968) the Court stated "Pre-Act discrimination does not furnish the basis for any relief under Title VII."

The doctrine that pensions are wages has been well established under the law. In the case of *Inland Steel Co.* v. *National Labor Relations Board,* 170 F. 2d 247 (7th Cir. 1948); cert. denied, 336 U.S. 960 (1949) at page 253, the Court stated:

> "Assume, however, that such supposed payments are made to employees as a result of a company obligation contained in a plan or program. Such

> an obligation would represent a part of the consideration for services performed, and payments made in the discharge of such obligations would, in our view, be 'wages' or included in 'conditions of employment'."

The ruling that pension credits are in the nature of wages continues to be manifest in the decisions of the National Labor Relations Board. *Administrative Decision of the General Council (NLRB), Case No. F-611 (9/11/58).*

The Courts have consistently held that the award of the restitution of back pay to remedy the effects of discriminatory practices under Title VII cannot include back pay on account of service prior to the effective date of the Act. As stated in a recent comprehensive review of this area of the law in the *Rutgers Law Review,* Back Pay Awards under Title VII of the Civil Rights Act of 1964: "Moreover, back pay cannot be awarded prior to July 2, 1965, the effective date of the Act since the Act is prospective only." *Rutgers Law Review,* Volume 26, Number 4, Page 760, (Summer 1973). This principle was supported in *Local 189, United Paperworkers* v. *United States,* 416 F.2d 980, 987 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Meat Cutters, Local 340* v. *Safeway Stores, Inc.,* 4 F.E.P. Cas. 510 (D. Kan. Feb. 4, 1972).

In *Bowe* v. *Colgate-Palmolive Co.,* 416 F. 2d 711 (7th Cir. 1969), the Court in determining the permissible period for back pay awards for female employees who had been discriminated against in work assignments stated:

> "Each class member should be allowed differential back pay for *all the time she worked from the effective date of Title VII* until the beginning of the new test period." (*Emphasis supplied*).

Similarly, with respect to the issue of back pay, the Court of Appeals in *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870 (6th Cir. 1973) stated at page 875:

> "On this issue *we are concerned only with a time period* beginning July 2, 1965, the effective date of Title VII, and ending November 4, 1968, the termination date of Timken's unit or departmental seniority system." (*Emphasis supplied*).

The above cases confirm the intent of Congress at the time of the enactment of Title VII to limit restitution of back pay by the Courts to the time period subsequent to the effective date of the Act. In addition, in furtherance of its purpose Congress expressed its intent to avoid windfall damage awards and to avoid harsh and sometimes unbearable economic burdens on employers by passing the 1972 amendment to Title VII, 42 U.S.C. 2000e-5 (g), limiting back pay liability to not more than two years prior to the filing of charges with the Equal Employment Opportunity Commission. Said paragraph 5(g) of the Statute as now amended reads:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. *Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a)." (*Emphasis supplied*).

The Pension Plan of Public Service Electric and Gas Company, for many years past, has been an essential part of every collective bargaining agreement negotiated between the Company and Labor Unions representing its employees. Improvements in pension benefits and eligibility therefor were regularly included in each new or renewed labor contract, and the cost of such improvements was a matter of collective bargaining treated as a wage cost and as part of a total package settlement. The actuarial costs of pension improvements were discussed with the Unions as part of each contract. The Pension Plan, which originated in 1911, was an integral part of the Company's plan of compensation and was so accepted by the Unions. Booklets describing the Plan were regularly distributed to all employees.

In conformity with the doctrine laid down in the *Inland Steel* case, *supra,* which ruled that pensions were wages

and therefore subject to collective bargaining, pension benefits for company employees were accrued year by year in accordance with provisions of the Plan. The intent of Congress to limit the restitution of back pay clearly applies to all compensation, irrespective of the form of payment, and must necessarily include pension benefits.

Thus, in this case the awarding of damages with respect to pension benefits cannot include differences in the benefits of men and women on account of service rendered prior to July 2, 1965, the effective date of Title VII. The key factor is the employee's time of service, not his date of retirement. This conclusion is inescapable irrespective of the time of receipt of pension benefits, that is, retirement occurring before or after the effective date of the Civil Rights Act, and as pointed out before, this Court has so determined.

The first case cited by the Petitioners in their Brief to support their contention that there is a conflict between the decision in the instant case and decisions of other Circuit Courts is the case of *Chastang* v. *Flynn and Emrich Co.,* 337 F. Supp. 807 (D. Ct. Md. 1972); 365 F. Supp. 957 (D. Ct. Md. 1973); Aff. in part, rev. in part, ——F.2d —— (4th Cir., June 10, 1976). At the time of the preparation of this Brief, this case has not been officially reported, but is contained in the Petitioners' Appendix starting at page 119a. The Fourth Circuit recognizes that the Act should not be applied retroactively, but holds that because of special facts in the *Chastang* case their findings were not a retroactive application of the Act. *"The invalidation of the discrimination involved no retroactive application of the Act"* (128a) (emphasis supplied).

The differences between the *Chastang* case and the cases presently before the Court are numerous. In the *Chastang* case, "the fund's annual statements and its advice to each participant of his interest in the fund" . . . indicated . . . "the proportionate interest . . . to which they would be entitled if they retired at normal retirement age. The reduction of their interest occurred by invoking the forfeiture provisions which became effective upon their early retirement" (127a). Furthermore, *"forfeiture was selective—males under certain conditions could receive full benefits upon early retirement—so that whether the forfeiture was to be invoked could not be determined until the time of retirement"* (128a) (emphasis supplied). Further, "the fund in effect received a windfall which did not affect the rights of any former Company employees who retired prior to the effective date of Title VII" (128a). In fact, the *Chastang* case did not deal with a pension plan, but with a profit sharing fund wherein portions of the profits were periodically allocated to the employees, to be paid upon retirement.

The individual participant in the Public Service Pension Plan, at the time he rendered his service, earned a fixed benefit stated in the Plan payable upon early retirement; the amount of such early retirement benefit was not dependent upon subsequent events. In *Chastang* the amount of early retirement benefit payable to the participant was not fixed at the time service was rendered, but rather reflected and was dependent upon subsequent events.

Thus, there was no retroactive application of the Act in either the *Rosen* or *Chastang* cases. In both *Rosen* and *Chastang* the Courts awarded redress for damages only on account of unlawful discrimination resulting from events which occurred subsequent to the effective date of the Civil Rights Act.

See also *Robinson* v. *Lorillard Corporation,* 444 F.2d 791 (4th Cir.), cert. denied, 404 U.S. 1006 (1971), which

held that the Civil Rights Act of 1964 does not prohibit or provide a remedy for acts of discrimination which occurred prior to July 2, 1965 (p. 795).

In the Public Service Pension Plan, the cost of early retirements at better than actuarial equivalent reductions in the cases of both males and females was included in the total costs on an hourly wage basis of collective bargaining settlements. There was no actuarial gain in the case of male early retirement because such payments were fully anticipated in the annual costing of the Plan.

On the contrary, to award a damage settlement on the basis argued by Petitioners would create additional unanticipated liabilities resulting in a substantial actuarial deficit which would reduce pension security for all participants under the Plan, both active and retired. This dilution of the interests of other participants by granting of windfall benefits to a few would be unconscionable.

The second case cited by Petitioners is *Stopford* v. *Boonton Molding Co.*, 56 N.J. 169, 265, A.2d 657 (1970). However, this case is concerned with the right of a company to terminate its funded, *contributory pension plan,* and to cease *the payment of benefits to an employee already retired.* There is no mention in the *Stopford* case of differing benefits to men and women. The Court characterized this pension plan as "an offer to pay a pension upon compliance by the employee with terms and conditions set forth therein", and the Court states, "Satisfaction of those requirements constituted adequate consideration and brought about a vesting of the right of lifetime benefits". The Public Service Pension Plan, for many years before the enactment of the Civil Rights Act, having been the subject of collective bargaining on an actuarial basis which assumed that certain numbers of male and female employees would retire early, was a great

deal more than "an offer to pay" upon "satisfaction of . . . requirements". Pension credits were accumulated by employees on a year-to-year basis, and in exact meaning of the *Inland Steel* decision, *supra,* represented negotiable compensation accrued from service performed in a given year and deferred as to payment until a later time. No other part of the *Stopford* case is pertinent.

The third case cited is that of *Fitzpatrick* v. *Bitzer,* 390 F. Supp. 278 (D.C. Conn. 1974), Aff. in part, rev. in part, 519 F.2d 559 (C.C.A.2d 1975), cert. granted *Bitzer* v. *Matthews,* Dkt. 75-251 (decided by this Court on June 28, 1976; not yet officially reported and, therefore, made a part of Respondent's Appendix (p. 1b)). This Court, in reversing in part and affirming in part, did not discuss the retroactive aspects of the Civil Rights Act, but decided the case on Constitutional grounds.

Petitioners' final cited case is *Albemarle Paper Company* v. *Moody,* 422 U.S. 405, 95 S. Ct. 2362 (1975); 45 L. Ed. 2d 283, recently decided by this Court. This case did not concern male and female early retirement provisions, but related to back pay awards *after* July 2, 1965 stemming from pre-existing minority hiring practices. The case was remanded to the District Court for determination of possible damage amounts. Mr. Chief Justice Burger, in an opinion concurring in part and dissenting in part, stated "it is undisputed that it (Albermarle) voluntarily discontinued such practices prior to the effective date of Title VII and that the statute does not—and could not—apply to acts occurring before its passage". Further, in a footnote to the majority opinion, Mr. Justice Stewart commented "under Title VII, back pay liability exists only for practices occurring after the effective date of the Act, July 2, 1965 • • •".

The tables on Page 51a, et seq. and those appearing in the Judgment of the District Court, starting on Page 43a, reflect exactly the results of applying the Petitioners' theory of damages to the early retirees.

In claiming damages based upon pension credits earned prior to July 2, 1965, they have managed to show much larger sums of money allegedly due under their theory. In fact, the figures vividly establish the Respondent's argument previously made on page 12 of this Brief, that such an interpretation would create a substantial actuarial deficit in the Public Service Plan, would dilute the interests of other participants, and would jeopardize the ability of the Company to continue the practice of liberalizing and improving pension benefits in the future.

The true magnitude of the actuarial deficit that would be created cannot be appreciated from an examination of the tables starting on pages 51a and 43a of the Petitioners' Brief. The names listed therein are the members of the Utility Co-Workers' Association alone. However, there are approximately 900 other male employees who retired early at reduced pensions, together with additional employees who will retire early in the future, all of whom will be affected by the ultimate decision in these cases. At the Pretrial Conference held in the Trial Court on September 4, 1974, after remand by the Third Circuit Court of Appeals, it was agreed by counsel for Public Service that the final decision on these two cases would be applied to all male employees of the Company who have retired or will retire early (20b, 23b).

The figures on alleged damages in the tables referred to, therefore, are a gross misinterpretation of the magnitude of the unanticipated additional pension liability.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM S. SMITH,
Counsel for Respondent.
By: HERMAN H. WILLE, JR.
Of Counsel.

[APPENDIX FOLLOWS]

APPENDIX

SUPREME COURT OF THE UNITED STATES

Nos. 75–251 AND 75–283

Garland M. Fitzpatrick et al., Petitioners, 75–251 *v.* Frederick Bitzer, etc., et al. Frederick Bitzer, etc., et al., Petitioners, 75–283 *v.* Donald Matthews et al.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 28, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination on the basis of "race, color, religion, sex, or national origin."[1] The

[1] Section 703 (a) of the Civil Rights Act of 1964 (hereinafter the 1964 Act), 78 Stat. 255, 42 U. S. C. § 2000e–2 (a), provides:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employ-

principal question presented by these cases is whether, as against the shield of sovereign immunity afforded the State by the Eleventh Amendment, *Edelman* v. *Jordan*, 415 U. S. 651 (1974), Congress has the power to authorize federal courts to enter such an award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment. The Court of Appeals for the Second Circuit held that the effect of our decision in *Edelman* was to foreclose Congress' power. We granted certiorari to resolve this important constitutional question. — U. S. — (1975). We reverse.

I

Petitioners in No. 75–251 sued in the United States District Court for the District of Connecticut on behalf of all present and retired male employees of the State of Connecticut. Their amended complaint asserted, *inter alia*, that certain provisions in the State's statutory retirement benefit plan discriminated against them because of their sex, and therefore contravened Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed., Supp. IV). Title VII, which originally did not include state and local governments, had in the interim been amended to bring the States within its purview.[2]

---

ment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[2] As relevant here, the definition of "person" in § 701 (a) of the 1964 Act, 78 Stat. 253, 42 U. S. C. § 2000e (a), was amended by § 2 (1) of the Equal Employment Opportunity Act of 1972 (hereinafter the 1972 Amendments), 86 Stat. 103, 42 U. S. C. § 2000e (a) (1970 ed., Supp. IV), to include "governments, governmental agencies, [and] political subdivisions."

The express exclusion of "a State or political subdivision thereof" provided in § 701 (b) of the former was stricken by § 2 (2) of the latter, 86 Stat. 103, 42 U. S. C. § 2000e (b) (1970 ed., Supp. IV). Section 2 (5) of the 1972 Amendments, 86 Stat. 103, 42 U. S. C. § 2000e (f) (1970 ed., Supp. IV), amended § 701 (f) of the 1964 Act, 42 U. S. C. § 2000e (f), to include within the definition of "employee" those individuals "subject to the civil service laws of a State government, governmental agency or political subdivision."

The 1972 Amendments retained the right of an individual aggrieved by an employer's unlawful employment practice to sue on his or her own behalf, upon satisfaction of the statutory procedural prerequisites, and made clear that that right was being extended to persons aggrieved by public employers. See 1972 Amendments, § 4 (a), 86 Stat. 104, 42 U. S. C. §§ 2000e–5 (a)–(g) (1970 ed., Supp. IV).

The District Court held that the Connecticut State Employees Retirement Act violated Title VII's prohibition against sex-based employment discrimination. 390 F. Supp. 278, 285–288 (1974).[3] It entered prospective injunctive relief in petitioners' favor against respondent state officials.[4] Petitioners also sought an award of retroactive retirement benefits as compensation for losses caused by the State's discrimination,[5] as well as "a rea-

[3] Petitioners had also alleged that the retirement plan was contrary to the Equal Protection Clause of the Fourteenth Amendment, but in view of its ruling under Title VII the District Court found no reason to address the constitutional claim. *Id.*, at 290.

[4] In No. 75–251, respondent Bitzer is the Chairman of the State Employees' Retirement Commission, and the other respondents are the Treasurer and the Comptroller of the State of Connecticut. These officials are cross-petitioners in No. 75–283.

[5] Section 706 (g) of the 1964 Act, 78 Stat. 261, as amended, 86 Stat. 107, 42 U. S. C. § 2000e–5 (g), provides in part:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor

sonable attorney's fee as part of the costs."[6] But the District Court held that both would constitute recovery of money damages from the State's treasury, and were therefore precluded by the Eleventh Amendment and by this Court's decision in *Edelman* v. *Jordan, supra.*

On petitioners' appeal,[7] the Court of Appeals affirmed in part and reversed in part. It agreed with the District Court that the action, "insofar as it seeks damages, is in essence against the state and as such is subject to the Eleventh Amendment." 519 F. 2d 559, 565 (1975). The Court of Appeals also found that under the 1972 Amendments to Title VII, "Congress intended to authorize a private suit for backpay by state employees against the state." *Id.*, at 568. Notwithstanding this statutory authority, the Court of Appeals affirmed the District Court and held that under *Edelman* a "private federal action for retroactive damages" is not a "constitutionally permissible method of enforcing Fourteenth Amendment rights." *Id.*, at 569. It reversed the District Court and remanded as to attorney's fees, however, reasoning that such an award would have only an "ancillary effect" on the state treasury of the kind permitted under *Edelman*, 415 U. S., at 667–668. *Id.*, at 571. The petition filed here by the state employees in No. 75–251 contends that Congress does possess the constitutional power under § 5 of the Fourteenth Amendment to au-

---

organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."

[6] See § 706 (k) of the 1964 Act, 78 Stat. 261, 42 U. S. C. § 2000e–5 (k).

[7] Respondent state officials did not appeal from the District Court's finding of a Title VII violation and the entry of prospective injunctive relief.

thorize their Title VII damage action against the State. The state officials' cross-petition, No. 75–283, argues that under *Edelman* the Eleventh Amendment bars any award of attorney's fees here because it will be paid out of the state treasury.

II

In *Edelman* this Court held that monetary relief awarded by the District Court to welfare plaintiffs, by reason of wrongful denial of benefits which had occurred previous to the entry of the District Court's determination of their wrongfulness, violated the Eleventh Amendment. Such an award was found to be indistinguishable from a monetary award against the State itself which had been prohibited in *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459, 464 (1945). It was therefore controlled by that case rather than by *Ex parte Young*, 209 U. S. 123 (1908), which permitted suits against state officials to obtain prospective relief against violations of the Fourteenth Amendment.

Edelman went on to hold that the plaintiffs in that case could not avail themselves of the doctrine of waiver expounded in cases such as *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964), and *Employees* v. *Department of Public Health and Welfare*, 411 U. S. 279 (1973), because the necessary predicate for that doctrine was congressional intent to abrogate the immunity conferred by the Eleventh Amendment. We concluded that none of the statutes relied upon by plaintiffs in *Edelman* contained any authorization by Congress to join a State as defendant. The Civil Rights Act of 1871, 42 U. S. C. § 1983, had been held in *Monroe* v. *Pape*, 365 U. S. 167, 187–191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant. The provisions of the Social Security Act relied upon by

plaintiffs were held by their terms not to "authorize suit against anyone," 415 U. S., at 674, and they, too, were incapable of supplying the predicate for a claim of waiver on the part of the State.

Both parties in the instant case agree with the Court of Appeals that the suit for retroactive benefits by these parties is in fact indistinguishable from that sought to be maintained in *Edelman*, since what is sought here is a damage award payable to a private party from the state treasury.[8]

Our analysis begins where *Edelman* ended, for in this Title VII case the "threshold fact of congressional authorization," 415 U. S., at 672, to sue the State as employer is clearly present. This is, of course, the prerequisite found present in *Parden* and wanting in *Employees*. We are aware of the factual differences between the type of state activity involved in *Parden* and that involved in the present case, but we do not think that difference is material for our purposes. The congressional authorization involved in *Parden* was based on the power of Congress under the Commerce Clause; here, however, the Eleventh Amendment defense is asserted in the context of legislation passed pursuant to Congress' authority under § 5 of the Fourteenth Amendment.[9]

As ratified by the States after the Civil War, that

[8] The Court of Appeals rejected petitioners' arguments that the retroactive benefits would not be paid out of public funds from the state treasury, and that the rule in *Edelman* and *Ford Motor Co.* was therefore inapplicable. 519 F. 2d, at 564–565. Petitioners have not challenged this ruling here.

[9] There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment. See, *e. g.*, H. R. Rep. No. 92–238, 92d Cong., 1st Sess., 19 (1971); S. Rep. No. 92–415, 92d Cong., 1st Sess., 10–11 (1971). Compare *National League of Cities* v. *Usery*, — U. S. — (1976).

Amendment quite clearly contemplates limitations on their authority. In relevant part, it provides:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . . . .
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The substantive provisions are by express terms directed at the States. Impressed upon them by those provisions are duties with respect to their treatment of private individuals. Standing behind the imperatives is Congress' power to "enforce" them "by appropriate legislation."

The impact of the Fourteenth Amendment upon the relationship between the Federal Government and the States, and the reach of congressional power under § 5, were examined at length by this Court in *Ex parte Virginia*, 100 U. S. 339 (1880). A state judge had been arrested and indicted under a federal criminal statute prohibiting the exclusion on the basis of race of any citizen from service as a juror in a state court. The judge claimed that the statute was beyond Congress' power to enact under either the Thirteenth [10] or the

[10] "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Fourteenth Amendments. The Court first observed that these Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." 100 U. S., at 345. It then addressed the relationship between the language of § 5 and the substantive provisions of the Fourteenth Amendment:

> "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . . It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.
>
> . . . . .
>
> "The argument in support of the petition for a *habeas corpus* ignores entirely the power conferred upon Congress by the Fourteenth Amendment. Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State . . . . But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete." 100 U. S., at 345–348.

Ex parte Virginia's contemporaneous recognition of this shift in the federal-state balance has been carried forward by more recent decisions of this Court. See, *e. g.*, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966); *Mitchum* v. *Foster*, 407 U. S. 225, 238–239 (1972).

There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a "carv-[ing] out" in *Ex parte Virginia*, 100 U. S., at 346.

It is true that none of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under § 5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans* v. *Louisiana*, 134 U. S. 1 (1890), are necessarily limited by

the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.[11] See *Edelman* v. *Jordan, supra; Ford Motor Co.* v. *Department of Treasury, supra.*

III

In No. 75–283, the state officials contest the Court of Appeals' conclusion that an award of attorney's fees in this case would under *Edelman* have only an "ancillary effect" on the state treasury and could therefore be permitted as falling outside the Eleventh Amendment under the doctrine of *Ex parte Young, supra.* 415 U. S., at 667–668. We need not address this question, since, given the express congressional authority for such an award in a case brought under Title VII,[12] it follows necessarily from our holding in No. 75–251 that Congress' exercise of

[11] Apart from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondents do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment.

[12] See n. 6, *supra.*

power in this respect is also not barred by the Eleventh Amendment. We therefore affirm the Court of Appeals' judgment in No. 75–283 on this basis.

The judgment in No. 75–251 is

Reversed.

The judgment in No. 75–283 is

Affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 75–251 AND 75–283

Garland M. Fitzpatrick et al., Petitioners,
75–251 *v.*
Frederick Bitzer, etc., et al.

Frederick Bitzer, etc., et al., Petitioners,
75–283 *v.*
Donald Matthews et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 28, 1976]

MR. JUSTICE BRENNAN, concurring in the judgment.

This suit was brought by present and retired employees of the State of Connecticut against the State Treasurer, the State Comptroller, and the Chairman of the State Employees' Retirement Commission. In that circumstance, Connecticut may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States. Rather, the question is whether Connecticut may avail itself of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to a claim for damages under Title VII. In my view Connecticut may not assert sovereign immunity for that reason I expressed in dissent in *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279, 298 (1973): the States surrendered that immunity, in Hamilton's words, "in the plan of the Convention" that formed the Union, at least insofar as the States granted Congress specifically enumerated powers. See *id.*, at 319 n. 7; *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974) (BRENNAN, J., dissenting); *Parden* v. *Terminal R. Co.*, 377 U. S. 184

(1964). Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause, Art. I, § 8, cl. 3, and in § 5 of the Fourteenth Amendment, two of the enumerated powers granted Congress in the Constitution. Cf. *Oregon* v. *Mitchell*, 400 U. S. 112, 131–134 (1970) (Black, J.); *id.*, at 135–150 (Douglas, J.); *id.*, at 216–217 (Harlan, J.); *id.*, at 236–281 (BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 282–284 (STEWART, J.); *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966). I remain of the opinion that "because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver." *Employees* v. *Missouri Public Health Dept.*, *supra*, at 300.

I therefore concur in the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

Nos. 75–251 AND 75–283

Garland M. Fitzpatrick et al., Petitioners,
75–251 *v.*
Frederick Bitzer, etc., et al.

Frederick Bitzer, etc., et al., Petitioners,
75–283 *v.*
Donald Matthews et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 28, 1976]

MR. JUSTICE STEVENS, concurring in the judgment.

In my opinion the commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment and, therefore, provides the necessary support for the 1972 Amendments to Title VII, even though Congress expressly relied on § 5 of the Fourteenth Amendment. But I do not believe plaintiffs proved a violation of the Fourteenth Amendment, and because I am not sure that the 1972 Amendments were "needed to secure the guarantees of the Fourteenth Amendment," see *Katzenbach* v. *Morgan*, 384 U. S. 641, 651, I question whether § 5 of that Amendment is an adequate reply to Connecticut's Eleventh Amendment defense. I believe the defense should be rejected for a different reason.

Even if the Eleventh Amendment does cover a citizen's suit against his own State,[1] it does not bar an action

[1] As Chief Justice Marshall has pointed out, the Eleventh Amendment is not literally applicable to this situation. See *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264, 412; see also *Employees* v. *Missouri Public Health Department*, 411 U. S. 279, (BRENNAN, J., concurring), 298–324.

against state officers enforcing an invalid statute, *Ex parte Young*, 209 U. S. 123, 159–160. Since the Connecticut pension law has been held to be invalid, at least in part, *Ex parte Young* makes it clear that the federal court properly acquired jurisdiction of the proceeding.

The Eleventh Amendment issue presented is whether the Court has power to enter a judgment payable immediately out of trust assets which subsequently would be reimbursed from the general revenues of the State. Although I have great difficulty with a construction of the Eleventh Amendment which acknowledges the federal court's jurisdiction of a case and merely restricts the kind of relief the federal court may grant,[2] I must recognize that it has been so construed in *Edelman* v. *Jordan*, 415 U. S. 651, and that the language of that opinion would seem to cover this case. However, its actual holding appears to be limited to the situation in which the award is payable directly from State funds and "not as a necessary consequence of compliance in the future" with a substantive determination. 415 U. S., at 668.

The holding in *Edelman* does not necessarily require the same result in this case; this award will not be paid directly from the state treasury, but rather from two separate and independent pension funds. The fact that the State will have to increase its future payments into

[2] Neither the language of the Eleventh Amendment nor the rationale of *Ex parte Young* draws any distinction between proceedings in law or in equity. The Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S. Const. Amend. XI.

the funds as a consequence of this award does not, in my opinion, sufficiently distinguish this case from other cases in which a State may be required to conform its practices to the federal Constitution and thereby to incur additional expense in the future. Since the rationale of *Ex parte Young* remains applicable to such cases, and since this case is not squarely covered by the holding in *Edelman*, I am persuaded that it is proper to reject the Eleventh Amendment defense.

With respect to the fee issue, even if the Eleventh Amendment were applicable, I would place fees in the same category as other litigation costs. Cf. *Fairmont Co.* v. *Minnesota*, 275 U. S. 70.

Pretrial Conference and Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

LEO ROSEN, et als.,

Plaintiffs,

v.

PUBLIC SERVICE ELECTRIC & GAS COMPANY,

Defendant.

Civil No. 245-66

MORGAN SWEENEY, et als.,

Plaintiffs,

v.

PUBLIC SERVICE ELECTRIC & GAS COMPANY,

Defendant.

Civil No. 955-68

Newark, New Jersey,
September 4, 1974.

Pretrial Conference and Order

Before:
The Honorable HERBERT J. STERN, U.S.D.J.

Appearances:

PARSONNET, PARSONNET & DUGGAN,
Attorneys for Plaintiffs.
By: GEORGE DUGGAN, Esq.

HERMAN H. WILLE, JR., Esq.
Attorney for Defendant.

The Court: This matter has been returned to the District Court by the 3rd Circuit with a published opinion in which the District Court was affirmed on the issue of liability but reversed on its finding that there were no damages.

In its opinion, the United States Court of Appeals for the 3d Circuit directed the District Court to consider the issue of damages and approved the finding of liability. We have conducted a pretrial conference this morning in which the issue has come down basically to one of law. It is the position of the plaintiffs that the law requires that all employees who retired subsequent to July 2, 1965, with equal amounts of seniority shall be treated equally.

The plaintiff points to the fact that there was no vesting of any pension rights by means of monies periodically set aside over the years prior to July 2, 1965, and that, therefore, upon the effective date of Title 7 all men retiring after July 2, 1965, are to receive the same pension as all women retiring subsequent to that date with equal amounts of seniority and pay, irrespective of the fact

Pretrial Conference and Order

that prior to July 2, 1965, there was a different formula applied to the prospective retirements of men and women who were then working with equal amounts of seniority and equal amounts of pay.

The position of Public Service, on the other hand, is that all the law requires and all the 3d Circuit has indicated is proper is that commencing July 2, 1965, all employees, men and women alike, begin to accrue equal amounts of credit towards retirement above that such disparities in credits earned previous to July 2, 1965, in respect to those who had not yet retired as of July 2, 1965, are to be left intact and are unaffected by the passage of Title 7.

The issue, thus, appears to be a pure legal question as to whether or not Title 7 affects the rights of employees who had not yet retired prior to its effective date so as to eliminate disparate formulas, disparate between men and women, which had been operating prior to the effective date of the statute.

Both sides have indicated that there is no question of disputed fact which needs to be resolved by any evidentiary hearing or taking of testimony; that all of the facts involved in the nature of the Pension Program and the nature of the agreements are undisputed. Although either side may point to a particular fact to sustain its legal conclusion, the facts, themselves, are not in dispute.

Accordingly, as I understand it, the parties agree that the question may be submitted as one of pure law to the Court without the need for any resolution of any factual controversy.

It has also been agreed, I believe, that the easiest way to proceed is for the Court to determine this question of

law before going into any accounting. And that based upon the Court's determination of this question of law either party will be given a reasonable time, as contemplated by the Federal Rules of Civil Procedure and appellate procedure to seek review of the Court's determination of the mathematical formula to be applied and that once that has been finalized either in this court or in a superior court all that will remain really is to compute the actual amounts of money involved. The parties have indicated that that they can do, themselves, once the Court has finally decided which measure of damages is to be applied.

The defendant Public Service has also stipulated, as I understand it, that once the courts have with finality—that is, upon the exhaustion of all appeals—once the courts have determined the measure of damages to be applied the construction of Title 7 which comes out of this case shall be applied by Public Service not only to the employees now represented in this lawsuit and before the Court but to all other male employees who are employed by Public Service whether they appear formally before this Court or not.

Upon that representation the Court does not believe it necessary to consider on its own motion whether or not the class of men here represented is broad enough, since upon the representation of the defendant all of its employees will get the benefit of whatever is finally determined by this action.

The Court will, therefore, take this on briefs. The parties are to brief the precise question as it has been defined in this pretrial conference; that is, whether or not Title 7 acts prospectively only or retrospectively, as

well, in terms of those who were still employed as of the effective date of the statute. That is a shorthand way of putting it but I think I have carefully delineated it above.

The parties are also, in the event that no precedent can be found squarely in point under this particular section of law, are to seek any analogies to any other discrimination-type cases in trying to reach a resolution of this difficult question.

As a separate question the parties are to brief their understanding of the meaning of "Footnote 11" in the opinion of the United States Court of Appeals in this controversy. They are to present the Court with their respective interpretations of what the United States Court of Appeals intended and their positions as to whether or not this Court ought to increase the scope of the class pursuant to Rule 23 in respect to women employees of Public Service. There are, therefore, to be two points to be briefed.

Briefs are to be served and filed with the Court and upon adversaries not later than September 25th. Responsive briefs, if desired, to be served upon adversaries and filed with the Court not later than October 9th.

Does that satisfactorily lay out all that needs to be done?

Mr. Duggan: It is minor, but the funding didn't start until 1967. Not 1965.

The Court: I don't think I said it was funded in 1965.

I said that the statute was passed in 1965.

Mr. Wille: Your Honor said it was not funded until prior to 1965.

The Court: It wasn't funded prior to 1965.

Mr. Duggan: Not funded until 1967.

The Court: That is a point of no significance. They will concede commencing in 1965, July 2nd, they must begin to give equal credit. The issue between the parties is whether as to employees still on the payroll after July 2nd, 1965, all employees are entitled under the statute to be treated the same in respect to prior service. I think it had been pointed out that one of the facts to consider was that under the Pension Plan prior to 1965 it was just kind of a formula propounded that there had never been any vesting of monies or setting aside of monies.

Mr. Duggan: There was money set aside that showed up in the Financial Report each year. It was so many million dollars.

The Court: Prior to?

Mr. Duggan: Yes. But it was never set up as a funded —it seems they set it—they would set aside so much to take care of the expenses that would show up in their annual report.

Mr. Lydecker: A so-called book reserve. Quite small. Pensions reserved. Book reserve.

The Court: There is no relation between that and any individual—in other words, it was not a trust fund set up?

Mr. Lydecker: No trust fund.

Mr. Sweeney: No trust fund.

The Court: I don't think that we have to be concerned with that, then. Nobody seems to think so.

All right. Anything else? If you would like to spread anything on the record—

Mr. Wille: Would you like me to make a statement on the record that I concur with the stipulations that you have raised?

The Court: If you would be so kind.

Mr. Wille: On behalf of the Public Service I wish to state that the representation of the Court regarding stipulations of the Public Service that the Pension—pardon me—that the formula would be applied to all male employees is correct.

The Court: I thank you for your cooperation, gentlemen.

Supreme Court, U. S.
FILED
AUG 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1908

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Petitioners,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

GEORGE DUGGAN,
Counsel for Petitioners,
10 Commerce Court,
Newark, New Jersey 07102.

PARSONNET, PARSONNET & DUGGAN,
Attorneys for Petitioners.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102 110

IN THE

Supreme Court of the United States

OCTOBER TERM—1975

No. 75-1908

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION
and MORGAN SWEENEY,

Petitioners,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

ARGUMENT

Males who retired early are paid smaller pensions than females—in violation of the Act. The Circuit Courts are in conflict on the proper measure of damages.

Respondent has referred to a "substantial actuarial deficit" on pages 12 and 14 of its Brief in Opposition. Actuarial computations cannot be relevant because there was no pension fund herein, prior to July 2, 1965. See *Chastang* v. *Flynn and Emerick Co.* at 365 F. Supp. 970 (D. Ct. Md. 1973) and 381 F. Supp. 1349, 1350 (D. Ct. Md. 1974). In addition, no actuarial computations are in evidence. See the Affidavit of Benjamin Percario (50a):

> "I am aware of no actuarial computations upon which the amounts of pensions paid were based, in any way, upon the predicted amounts of moneys which would have been available to any fund for investment and other purposes due to early retirement by male employees."

In *Rosen,* males who retired early after July 2, 1965, are paid smaller pensions than females because they are penalized for pension credits earned prior to July 2, 1965. In *Chastang* v. *Flynn and Emerick Co.,* 337 F. Supp. 807 (D. Ct. Md. 1972); 365 F. Supp. 957 (D. Ct. Md. 1973); 381 F. Supp. 1348 (D. Ct. Md. 1974); aff'd in part, rev. in part —— F2d —— (4th Cir. June 10, 1976) the Court refused to penalize males who retired early after July 2, 1965, for pension credits earned prior to July 2, 1965.

In *Chastang,* the trial court interpreted *Rosen* to mean (365 F.Supp. 957, 969):

> ". . . plaintiffs are entitled to receive full benefits . . . earned . . . between the effective date of Title VII and the effective dates of their respective retirements . . ."

This rule of damages was applied by the District Court herein, citing *Chastang* as authority (37a).

The Fourth Circuit Court of Appeals majority opinion in *Chastang* stated (127a):

> "We recognize the Rosen v. Public Service Electric & Gas Co., . . . tends to support the position of the Company . . . nonetheless; we agree with the district court."

Senior Circuit Judge Bryan stated in dissent (135a):

> "Retroactivity of the Act to pension plans has been twice denied by the Third Circuit: Rosen v. Public Service & Gas Co., 477 F2d 90 (1973) and eo nomine, 527 F2d 645 (1976) with opinion unpublished."

The Circuit Courts are in conflict on this issue. Pension Plans affect millions of workers in the United States. This question should be resolved by the United States Supreme Court.

Respectfully submitted,

PARSONNET, PARSONNET & DUGGAN
Attorneys for Petitioners
10 Commerce Court
Newark, New Jersey 07102
(201) 622-8347

By: GEORGE DUGGAN
Counsel for Petitioners